Supreme Court, U.S.
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No. ___

IN THE

# Supreme Court of the United States

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JAY COHEN,

*Petitioner*,

v.

UNITED STATES,

*Respondent.*

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**Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

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## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

I. Under the doctrine first set forth in *People v. Powell*, 63 N.Y. 88 (1875), the government must prove the existence of a "corrupt motive"–generally knowledge of the illegality of the underlying conduct–in a prosecution for a conspiracy to commit an act that is innocent in itself but forbidden by statute. On three prior occasions, this Court has reserved the question whether the long-standing *Powell* doctrine applies in a prosecution under the general federal conspiracy statute, 18 U.S.C. § 371. The question presented is whether the Second Circuit, in conflict with the decisions of numerous other Circuits, erred in holding that the *Powell* doctrine did not apply under 18 U.S.C. § 371.

II. Section 1084 of Title 18 prohibits "knowingly" transmitting certain interstate "bets or wagers," and it prohibits knowingly transmitting information assisting in the placing of bets or wagers unless the information is transmitted to and from jurisdictions in which such betting is "legal." The question presented is whether the Second Circuit, in conflict with decisions of numerous courts of appeals and with principles articulated by this Court, erred in defining the principal terms of 18 U.S.C. § 1084–"legal," "knowingly," and "bets or wagers"–to permit a conviction based on conduct that neither relevant jurisdiction has criminalized and that the defendant believes is not a bet or wager but instead is merely information assisting in the placing of a bet.

## TABLE OF CONTENTS

QUESTIONS PRESENTED ..... i

TABLE OF AUTHORITIES ..... iv

OPINION BELOW ..... 1

JURISDICTION ..... 1

STATUTORY PROVISIONS INVOLVED ..... 1

STATEMENT OF THE CASE ..... 1

A. The Formation of World Sports Exchange ..... 2

B. District Court Proceedings ..... 4

C. The Court of Appeals Decision ..... 7

REASONS FOR GRANTING THE WRIT ..... 9

A. The Second Circuit's Rejection of the "*Powell* Doctrine" Squarely Conflicts with the Decisions of Other Circuits and Erroneously Decides An Important Question That this Court Has Reserved Expressly on At Least Three Occasions. ..... 11

B. The Second Circuit's Interpretation of § 1084 Squarely Conflicts with Numerous Decisions of this Court and the Courts of Appeals, Erroneously Resolves Several Provisions of a Critically Important Statute, and Effectively Criminalizes Innocent Conduct. ..... 18

**TABLE OF CONTENTS - continued**

1. The Second Circuit's holding that "legal" incorporates violation of both criminal and civil law conflicts with numerous decisions of the Circuits and is unsupportable ..... 18

2. The Second Circuit's decision regarding the mens rea necessary for a violation of § 1084 conflicts with principles in this Court's decisions and further unsettles an area of the law as to which the Circuits are in disarray ..... 22

3. The issues raised by the Second Circuit's erroneous interpretation of § 1084 are critically important ..... 29

CONCLUSION ..... 30

APPENDIX A

*United States v. Cohen*, 260 F.3d 68 (2d Cir. 2001) .. 1a

APPENDIX B

Order, *United States v. Cohen*, No. 00-1574 (2d Cir. Oct. 25, 2001) ..... 19a

APPENDIX C

Statutory Provisions Involved ..... 20a

## TABLE OF AUTHORITIES

Page

**CASES**

*California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) ..... 21

*Callanan v. United States*, 364 U.S. 587 (1961) ..... 16

*Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994) ..... 14

*Cohen v. United States*, 378 F.2d 751 (9th Cir. 1967) ..... 23

*Commonwealth v. Benesch*, 194 N.E.2d 905 (Mass. 1935) ..... 12

*Commonwealth v. Gormley*, 77 Pa. Super. 298 (1921) ..... 12

*Cruz v. United States*, 106 F.2d 828 (10th Cir. 1939) ..... 11, 12, 15

*Dowling v. United States*, 473 U.S. 207 (1985) ..... 28

*Erlenbaugh v. United States*, 409 U.S. 239 (1972) .... 22

*FCC v. American Broadcasting Co.*, 347 U.S. 284 (1954) ..... 26

*Fall v. United States*, 209 F. 547 (8th Cir. 1913) ... 12, 15

*Harrison v. United States*, 7 F.2d 259 (2d Cir. 1925) ..... 18

*Huddleston v. United States*, 415 U.S. 814 (1974) .. 21, 22

*Keegan v. United States*, 325 U.S. 478 (1945) .. 15, 16, 17

*Landen v. United States*, 299 F. 75 (6th Cir. 1924) . 11, 15

**TABLE OF AUTHORITIES - continued**

Page

*Lescallett v. Commonwealth*, 17 S.E. 546 (Va. 1893) ..... 26, 27

*Liparota v. United States*, 471 U.S. 419 (1985) . 24, 25, 26

*McBoyle v. United States*, 283 U.S. 25 (1931) ..... 26

*McQuesten v. Steinmetz*, 58 A. 876 (N.H. 1904) ... 26, 27

*Morissette v. United States*, 342 U.S. 246 (1952) ..... 25

*People ex rel. Small v. Harrah's-North Kansas City Corp.*, 208 F.3d 218 (8th Cir. 2000) (unpublished table opinion) ..... 20

*People v. Powell*, 63 N.Y. 88 (1875) ..... *passim*

*Pereles v. Weil*, 157 F. 419 (E.D. Wis. 1907) ..... 12, 15

*Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385 (1972) ..... 13

*Mitchell v. State*, 27 So. 2d 36 (Ala. 1946) ..... 12

*Rewis v. United States*, 401 U.S. 808 (1971) ..... 21, 22

*Saratoga Harness Racing, Inc. v. City of Saratoga Springs*, 390 N.Y.S.2d 240 (N.Y.A.D. 1976), *aff'd*, 380 N.E.2d 163 (N.Y. 1978) ..... 26, 27

*Staples v. United States*, 511 U.S. 600 (1994) ..... 25

*State v. Burns*, 9 N.W.2d 518 (Minn. 1943) ..... 12

*Sterling Suffolk Racecourse Ltd. Partnership v. Burrillville Racing Ass'n Inc.*, 989 F.2d 1266 (1st Cir. 1993) ..... 8, 19, 20

**TABLE OF AUTHORITIES - continued**

Page

*United States v. Baker*, 63 F.3d 1478 (9th Cir. 1995) ..... 25

*United States v. Barker*, 514 F.2d 208 (D.C. Cir. 1975) ..... 12, 15

*United States v. Barker*, 546 F.2d 940 (D.C. Cir. 1976) ..... 25

*United States v. Blair*, 54 F.3d 639 (10th Cir. 1995) ..... 13, 23

*United States v. Crimmins*, 123 F.2d 271 (2d Cir. 1941) ..... 15

*United States v. DeLuna*, 763 F.2d 897 (8th Cir. 1985) ..... 21

*United States v. Dege*, 364 U.S. 51 (1960) ..... 14

*United States v. Feola*, 420 U.S. 671 (1975) ..... *passim*

*United States v. Ferber*, 966 F. Supp. 90 (D. Mass. 1997) ..... 21

*United States v. Finazzo*, 704 F.2d 300 (6th Cir. 1983) ..... 21

*United States v. Freed*, 401 U.S. 601 (1971) ..... 13, 24

*United States v. Gordon*, 464 F.2d 357 (9th Cir. 1972) ..... 20

*United States v. Hagen*, 951 F.2d 261 (10th Cir. 1991) ..... 20

*United States v. International Minerals & Chemical Corp.*, 402 U.S. 558 (1971) ..... 10, 18

**TABLE OF AUTHORITIES - continued**

Page

*United States v. Kelley*, 254 F. Supp. 9 (S.D.N.Y. 1966), *aff'd in part and rev'd in part on other grounds*, 395 F.2d 727 (2d Cir. 1968) ..... 20

*United States v. Lanier*, 520 U.S. 259 (1997) ..... 22

*United States v. Mitlof*, 165 F. Supp. 2d 558 (S.D.N.Y. 2001) ..... 12, 18

*United States v. Murray*, 928 F.2d 1242 (1st Cir. 1991) ..... 13

*United States v. Nardello*, 393 U.S. 286 (1969) .... 21, 22

*United States v. Polizzi*, 500 F.2d 856 (9th Cir. 1974) ..... 21

*United States v. Previte*, 648 F.2d 73 (1st Cir. 1981) ..... 12

*United States v. Rabinowich*, 238 U.S. 78 (1915) ..... 16

*United States v. Reminga*, 493 F. Supp. 1351 (W.D. Mich. 1980) ..... 12, 16

*United States v. Stewart*, 205 F.3d 840 (5th Cir. 2000) ..... 20, 21

*United States v. Thomas*, 887 F.2d 1341 (9th Cir. 1989) ..... 13

*United States v. Truesdale*, 152 F.3d 443 (5th Cir. 1998) ..... 27

*United States v. X-Citement Video Inc.*, 513 U.S. 64 (1994) ..... 24, 26

*Wood v. State*, 1 A. 509 (N.J. 1885) ..... 12

**TABLE OF AUTHORITIES - continued**

Page

**STATUTES**

15 U.S.C. §§ 3001-3007 ..... 19
15 U.S.C. § 3002(3) ..... 28
18 U.S.C. § 371 ..... *passim*
18 U.S.C. § 1084 ..... *passim*
St. 1867, ch. 169, § 30 (Mar. 2, 1867) ..... 14
St. 1909, ch. 321, Preamble & § 37 (Mar. 4, 1909) .... 14
Cal. Bus. & Prof. Code § 19604 ..... 27
Minn. Stat. § 609.75 ..... 26
N.Y. Rac. Pari-Mut. Wag. & Breed. Law § 1012 ..... 27
Or. Admin. R. § 462-220-0020(2) ..... 27
Or. Admin. R. § 462-220-0060 ..... 27
Or. Rev. Stat. § 462.142 ..... 26, 27
4 Pa. Cons. Stat. § 325.218 ..... 27
58 Pa. Code § 169.3 ..... 27

**LEGISLATIVE MATERIALS**

18 U.S.C. § 371 Historical Notes ..... 14
Hearing Before Subcomm. No. 1 of the House Judiciary Comm. (Mar. 7, 1947) (statements of Rep. Devitt, Mr. Miller), *reprinted in* 1948 U.S. Code Cong. Serv. 2686 (special pamphlet ed.) ..... 14

**TABLE OF AUTHORITIES - continued**

Page

H.R. Rep. No. 80-304 (1947), *reprinted in* 1948 U.S. Code Cong. Serv. 2434 (special pamphlet ed.) . . . . . 14

H.R. Rep. No. 87-967 (1961) . . . . . 22

S. Rep. No. 87-588 (1961) . . . . . 22

**MISCELLANEOUS**

Mike Brunker, *On-Line Gambling Goes Global*, MSNBC, Apr. 10, 2001, *at* http://www.msnbc.com/news/544764.asp?0sp =n6b1b1 . . . . . 29

Beth Allison Davis & Josh Vitullo, *Federal Criminal Conspiracy*, 38 Am. Crim. L. Rev. 777 (2001) . . . . . 18

*Developments in the Law-Criminal Conspiracy*, 72 Harv. L. Rev. 920 (1959) . . . . . 11, 15, 16

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Adrian Goss, *Jay Cohen's Brave New World: The Liability of Offshore Operators of Licensed Internet Casinos for Breach of United States' Anti-Gambling Laws*, 7 Rich. J.L. & Tech. 32 (2001) . . . . 17

http://www.tbwsport.com/bookmakers/america.html . . 29

National Gambling Impact Study Comm'n, *Final Report* (1999) . . . . . 30

Pattern Jury Instructions of the District Judges Association of the Eleventh Circuit, Criminal Cases, Offense Instruction Nos. 9.1, 37 (1997) . . . . . 23

**TABLE OF AUTHORITIES - continued**

Page

Rebecca Quick, *Entrepreneurs Roll the Dice on a New Site*, Wall St. J., Apr. 10, 1997 . . . . . 4

2 Francis Wharton, *A Treatise on Criminal Law* § 1606 (11th ed. 1912) . . . . . 15

Glanville Williams, *Criminal Law: The General Part* (2d ed. 1961) . . . . . 24, 25

John Shepard Wiley Jr., *Not Guilty By Reason of Blamelessness,* 85 Va. L. Rev. 1021 (1999) . . . . . 18

Alex Wong, *Racetracks Try to Get Handle on Net Wagers*, Lexington Herald Leader, Aug. 28, 2001 . . . . . 30

## PETITION FOR A WRIT OF CERTIORARI

Jay Cohen respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

## OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 260 F.3d 68.

## JURISDICTION

The court of appeals entered its judgment on July 31, 2001 (Pet. App. 1a), and denied a timely petition for rehearing and suggestion for rehearing en banc on October 25, 2001 (Pet. App. 19a). On January 11, 2002, Justice Ginsburg extended the time for filing a petition for a writ of certiorari to and including February 22, 2002. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

The statutes at issue in this case are 18 U.S.C. § 371 and 18 U.S.C. § 1084. Those provisions are reprinted in full at Pet. App. 20a-22a.

## STATEMENT OF THE CASE

This case presents critical questions as to the scope of the federal conspiracy statute, 18 U.S.C. § 371, and 18 U.S.C. § 1084 (the "Wire Act") in the important context of Internet gambling. In the decision below, the Second Circuit affirmed the conviction under these statutes of Jay Cohen, an Internet entrepreneur who started a sports betting company modeled on state-approved off-track betting facilities. In so doing, the Second Circuit interpreted these provisions of the federal criminal code so as to criminalize otherwise innocent conduct, creating conflicts with numerous decisions of this Court and the Circuits and expanding the scope of these statutes far beyond what Congress intended.

The Second Circuit's decision effectively criminalizes significant portions of two highly regulated and otherwise legal industries–the off-shore wagering industry and the off-track betting industry–that employ thousands of people and handle

billions of dollars in transactions. Under the Second Circuit's decision, these businesses and their employees stand, like petitioner, wrongly accused of criminal conduct and threatened with financial ruin, in plain violation of congressional intent.

**A. The Formation of World Sports Exchange**

In 1996, petitioner Jay Cohen, a twenty-nine-year-old U.C. Berkeley graduate, held a lucrative position as a top trader at Group One, a San Francisco firm trading in options and derivatives. Intrigued by the interest shown by his fellow traders in casual sports betting that mimicked the operation of the financial markets–trading in so-called sports "futures"–Mr. Cohen and his colleagues explored the possibility of establishing an Internet business that would permit such betting.

After conducting extensive due diligence, Mr. Cohen learned that several apparently legitimate business models existed. He discovered, for example, that the New York Off-Track Betting Corporation, as authorized by the state of New York, allowed out-of-state customers to establish accounts in New York and to give telephone instructions for wagers to be placed from those accounts. He also discovered that Sports International, a publicly traded company that had Congress's former majority whip on its Board of Directors, was already conducting a sports wagering business based off-shore, as were a number of other companies.

Mr. Cohen turned to the international consulting firm of KPMG for help in establishing and licensing his sports betting business. KPMG initially informed Mr. Cohen that its in-house counsel would have to approve its involvement in a sports betting enterprise. Shortly thereafter, KPMG told him that the necessary authorization had been given. In addition, both KPMG and the law firm of Orrick, Herrington & Sutcliffe approved various corporate materials prepared by Mr. Cohen and his associates in connection with a private placement.

A.625, 644.[1]

After raising the necessary seed money, Mr. Cohen and his colleagues moved to Antigua, where betting is entirely legal and where strict licensing requirements and regulations are in place. KPMG helped to incorporate Mr. Cohen's sports business in Antigua and successfully worked with the Antiguan government to help Mr. Cohen obtain the necessary licenses, which WSE held at all times relevant to this matter.

In early 1997, Mr. Cohen launched World Sports Exchange ("WSE"). WSE was established as an "account wagering" operation, patterned after the New York Off-Track Betting Corporation. In an account wagering system, a customer establishes and funds an account where the wagering operation is located–in WSE's case, in Antigua–and then from time to time authorizes, via telephone or Internet, the use of funds from that account to place wagers. The wagers themselves take place, however, only after the wagering operation ensures that there are sufficient funds in the account to cover the requested wager and that the wager otherwise complies with the operation's guidelines. WSE's rules and regulations provided explicitly that "[a]ll wagers . . . take place at our server in Antigua," and made clear that WSE "reserves the right to refuse any wager prior to its acceptance." A.300, 348. Indeed, although WSE advertised throughout the world, *all* of its actual operations were confined solely to Antigua. A.511.

From WSE's inception, Mr. Cohen operated the business openly as a lawful and legitimate enterprise. For example, consistent with the tax advice he had received from KPMG, Mr. Cohen reported all of his income to the United States, reported that his business was "wagering," and paid all relevant taxes.

Indeed, Mr. Cohen quickly became the public face of the

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[1] "A." refers to the Appendix filed by Mr. Cohen before the Second Circuit.

burgeoning off-shore wagering industry. His business was featured in a 1997 article in the *Wall Street Journal* as well as in various other media. *See, e.g.*, Rebecca Quick, *Entrepreneurs Roll the Dice on a New Site*, Wall St. J., Apr. 10, 1997, at B18. Mr. Cohen debated United States officials on live national television, submitted to Congress written testimony–which included a detailed description of WSE's account-wagering operations–on pending legislation, and spoke at numerous venues in the United States.

**B. District Court Proceedings**

In late 1997 and early 1998, at the prompting of a prominent New York law firm representing the NFL, NBA, NHL, and Major League Baseball, the FBI began an investigation of WSE. Following that investigation, the government filed a criminal complaint naming Mr. Cohen; he then voluntarily returned to the United States, although he was not subject to extradition from Antigua, and was arrested. Mr. Cohen was ultimately indicted in the Southern District of New York and charged with (1) one count of violating 18 U.S.C. § 371, the general conspiracy statute, by conspiring to violate 18 U.S.C. § 1084 and (2) seven substantive counts of violating and aiding and abetting violations of § 1084.[2] All of these charges were based on Mr. Cohen's operation of WSE, and each of the substantive counts was based on a phone call or Internet connection made by undercover FBI agents in New York.

Prior to trial, Mr. Cohen moved to dismiss all counts,

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[2] In the eight-count indictment on which Mr. Cohen was tried, two of the substantive counts charged Mr. Cohen only with transmitting "information assisting in the placing of bets or wagers." The remaining substantive counts charged him with transmission of information as well as with transmission of bets or wagers themselves and with transmission of communications that "entitle[d] the recipient to receive money or credit as a result of bets or wagers." 18 U.S.C. § 1084(a). Also, two of the counts related only to contacts with WSE in Antigua that took place after Mr. Cohen's arrest in New York.

arguing that he lacked the necessary mens rea for both the conspiracy and substantive offenses, that his actions fell within the scope of the safe harbor provided by § 1084(b), and that the United States lacked jurisdiction to prosecute him. The motion was denied.

At trial, the government's case centered on the testimony of a private investigator employed by the sports leagues' law firm and of undercover government agents. These agents had (like WSE's other clients) opened and funded accounts with WSE; contacted WSE via telephone and Internet and authorized the placement of bets; and received any winnings in their accounts as requested. Mr. Cohen's motion for a judgment of acquittal on all counts at the close of the government's case was denied.

Mr. Cohen's principal defense was that he had intended from the start to establish a lawful business and that he believed in good faith that he had done so. Mr. Cohen testified about the founding of WSE, the advice and assistance he received from KPMG, Group One, and Orrick Herrington, and his role as an unofficial industry spokesman. He testified that he "wanted to do this legally," that he therefore moved to Antigua and located the entire business there, and that he "modeled" WSE "after Capital Off-Track Betting in New York." He explained his reliance on a published statement of a Justice Department official that off-shore wagering was outside the scope of U.S. law. He also explained his good faith belief that WSE's use of an account wagering system ensured that only information assisting in the placing of the bet is transmitted between WSE and its customers, as well as his belief that any actual bet "takes place [in Antigua]."[3] A.511-12, 521-51, 603-66.

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[3] The district court permitted much of Mr. Cohen's testimony (although it later instructed the jury that this testimony was irrelevant), but limited other evidence that would have shown his good faith. The court refused, for example, to allow a defense witness to testify about consultations with the law firm Orrick Herrington concerning Group One's WSE investment.

The district court's charge to the jury, however, eviscerated Mr. Cohen's good faith defense. First, the court noted that any "evidence to the effect that the defendant did not think that he was violating the statute" was "basically irrelevant." As long as Mr. Cohen "d[id] the deeds and kn[ew] that he was doing the deeds," then he was guilty "regardless of whether he considered that he was setting his business up in a way to avoid that, or regardless of whether he had an impression from some source or another that he wasn't violating the law." A.878-83. The court also instructed the jury that "anything that you have heard about New York state law, or off-track betting, is really not relevant to our case because the case doesn't arise under the off track betting regulations of New York State." A.857.

Second, the court refused to allow the jury even to consider the safe harbor contained in § 1084(b), which protects a defendant from criminal liability for transmission of "information assisting in the placing of bets or wagers" on a sporting event if the information is sent "from a State or foreign country where betting on that sporting event or contest is legal into a State or foreign country in which such betting is legal." 18 U.S.C. § 1084(b). Although the court conceded that betting in New York is not a "violation of a specific criminal law," the court nonetheless held that "this kind of betting was not and is not legal under New York law." A.711-28.

Third, the court's charge precluded any argument that the transmissions in question involved "information assisting in the placing of bets or wagers" rather than "bets or wagers" themselves. The court's charge also disparaged the defendant's

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A.456-64, 483, 626-44. The court also deemed irrelevant the testimony of Gyneth McAllister, a government official in charge of Antigua's gaming regulations, who was prepared to testify about the steps taken to set up WSE, Antiguan law in relation to WSE, and her interactions with U.S. officials concerning gaming regulation and with Mr. Cohen himself. A.282-85.

belief that the bets took place or occurred only in Antigua as "a fiction [that] would avoid the facts that are relevant under the statute." A.873-75.

In response to specific questions from the jury during its deliberations, the district court reiterated and clarified that defendant's good faith belief in the legality of his conduct was irrelevant. The court emphasized that a defendant could be convicted of conspiracy "even if he was ignorant that the deeds violated the statute," and could be convicted of the underlying offenses "if he did . . . the deeds, and if he knew that the deeds were done." Moreover, when the jury asked for a full copy of § 1084 and a read-back of Mr. Cohen's testimony concerning his knowledge of § 1084 (which included testimony that he understood his conduct to fall within the § 1084(b) "exception"), the judge provided a copy of § 1084(a), titled it simply "§ 1084," and refused to provide a copy of § 1084(b)–and he re-instructed the jurors that § 1084(b) was irrelevant to their task. A.930-44, 964-79.

Following these additional instructions, the jury found Mr. Cohen guilty on all eight counts.[4] The district court sentenced Mr. Cohen to twenty-one months of imprisonment and two years of supervised release, and imposed a special assessment of $800 and a fine of $5,000.[5]

### C. The Court of Appeals Decision

In an opinion authored by District Judge Keenan, sitting by designation, the court of appeals affirmed.

With respect to the conspiracy conviction, the court rejected

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[4] Pursuant to special interrogatories for the substantive counts that charged more than mere transmission of "information assisting in the placing of bets or wagers," the jury found Mr. Cohen guilty of transmission of (1) bets, (2) information assisting in the placing of bets, and (3) communications entitling the recipient to money or credit as the result of bets.

[5] The district court has granted Mr. Cohen bail pending this Court's decision.

Mr. Cohen's argument that the district court's rulings on mens rea could not be squared with the long-standing "*Powell* doctrine." As the Second Circuit recognized, under *People v. Powell*, 63 N.Y. 88 (1875), "[p]ersons who agree to do an act innocent in itself, in good faith and without the use of criminal means, are not converted into conspirators [] because it turns out that the contemplated act was prohibited by statute." Pet. App. 5a (internal quotation marks omitted).

The Second Circuit conceded that "[t]he *Powell* doctrine was echoed in federal cases from the first half of the last century," but concluded nevertheless that "the *Powell* doctrine does not apply to a conspiracy to violate 18 U.S.C. § 1084." *Id.* 5a-7a. In reaching this conclusion, the court of appeals made no effort to explain why Congress, when it enacted the current version of the conspiracy statute in 1948, did not intend to incorporate a doctrine that was by then well settled in federal courts. Instead, the court asserted that recently "many circuits have . . . , in effect, moved away from the doctrine," noted prior instances of Second Circuit *dicta* disapproving of the doctrine, and observed that the commentary to the Model Penal Code rejects *Powell*'s reasoning. *Id.* The court also relied (without analysis) on this Court's decision in *United States v. Feola*, 420 U.S. 671 (1975), even though *Feola* reserved expressly the question of *Powell*'s applicability. *See* Pet. App. 7a.

The court of appeals next determined that Mr. Cohen's actions did not fall within the scope of § 1084(b)'s safe harbor. The court did not dispute Mr. Cohen's contention that the placing of bets is not a crime in New York, but found that, under the "plain meaning" of the term "legal," state civil law proscriptions were sufficient to transform WSE's business into a federally criminal enterprise. *Id.* 8a. The court sought to distinguish the First Circuit's contrary decision in *Sterling Suffolk Racecourse Ltd. Partnership v. Burrillville Racing Ass'n*, 989 F.2d 1266 (1st Cir. 1993), on the ground that the case arose in the context of a RICO claim and not in "a § 1084

prosecution," even though the predicate offense alleged in that RICO case was a violation of § 1084. Pet. App. 9a.

Further, although it found further safe-harbor-related issues to be "immaterial" in light of its legality ruling, the Second Circuit concluded that the transmissions in question were transmissions of "bets or wagers" (and thus not subject to § 1084(b))–not transmissions of "information assisting in the placing of bets or wagers." *Id.* 10a-12a. Attaching no significance to the "account wagering" system established by WSE and its similarity to the system used by state-approved New York Off-Track Betting Corporation (and authorized by many other states and governments around the world), the court concluded that "bets" were transmitted because "someone in New York signaled an offer to place a particular bet" and "someone at WSE signaled an acceptance of that offer." *Id.* 11a.

The court also cursorily rejected Mr. Cohen's argument that he did not "knowingly" transmit a bet or wager because he understood that the account wagering system transmitted only "information assisting in the placing of bets or wagers," not a bet or wager itself. The court concluded that "it mattered only that Cohen knowingly committed the deeds forbidden by § 1084," and that Mr. Cohen's "own interpretation regarding what constituted a bet was irrelevant." *Id.* 13a.

Finally, the court of appeals rejected Mr. Cohen's arguments that the rule of lenity should inform the court's interpretation of the terms "legal" and "bets or wagers," neither of which is defined in the statute. The court found that these terms did not create a "grievous ambiguity"–or, indeed, any ambiguity at all–as applied in this case. *Id.* 13a-15a.

## REASONS FOR GRANTING THE WRIT

The Second Circuit interpreted both the federal conspiracy statute and the federal Wire Act in ways that dramatically expand the reach of those statutes and criminalize innocent conduct. This decision creates and deepens conflicts with

decisions of this Court and the courts of appeals, and threatens two large, flourishing, and highly regulated industries.

With respect to the federal conspiracy statute, the Second Circuit refused to apply the longstanding *Powell* doctrine, which requires a "corrupt motive"–often knowledge of the illegality of the underlying conduct–for conspiracy to commit an act that is "innocent in itself" but forbidden by statute. That holding places the Second Circuit in direct conflict with numerous decisions from the courts of appeals on a question this Court has reserved at least three times. Moreover, the Second Circuit's rejection of *Powell* permits the "infliction of criminal punishment on the unaware," *United States v. International Minerals & Chemical Corp.*, 402 U.S. 558, 565 (1971) (Stewart, J., dissenting), in disregard of congressional intent.

With respect to the Wire Act, the Second Circuit misread the critical terms of the statute, thereby exacerbating the existing confusion in the Circuits as to the meaning of these terms. The Second Circuit's broad reading of "legal" and "bets or wagers" and the court's misapplication of the statute's mens rea requirement effectively eliminate from the statute the safe harbor provision that Congress created and obliterate the careful statutory distinctions between information assisting in the placing of bets and wagers and the bets and wagers themselves.

In so doing, the Second Circuit's decision threatens serious harm to the off-shore wagering industry and the off-track betting industry, and it intrudes unnecessarily on the sovereignty of the States and foreign governments that regulate those industries, which employ thousands of people and handle billions of dollars in transactions that the relevant governments have determined should not be criminalized. Under the Second Circuit's decision, these businesses and their employees, like petitioner, are placed in criminal and financial jeopardy.

Accordingly, the instant petition should be granted.

**A. The Second Circuit's Rejection of the "*Powell* Doctrine" Squarely Conflicts with the Decisions of Other Circuits and Erroneously Decides an Important Question That this Court Has Reserved Expressly on At Least Three Occasions.**

This case presents squarely a question that has divided the Circuits and that this Court has reserved on at least three prior occasions, namely, whether the government must prove the existence of a "corrupt" motive for conspiracy to commit an offense that is merely *malum prohibitum*, rather than *malum in se*. Because this question is of critical importance and because the Second Circuit misapplied and ignored critical precedent from this Court, the petition should be granted.

1. In *People v. Powell*, 63 N.Y. 88 (1875), the New York Court of Appeals overturned convictions for conspiracy by public officials to purchase supplies without first advertising for suppliers, distinguishing between the mens rea required for the underlying substantive offense and the mens rea required for the separate crime of conspiracy. The court held that "to make an agreement between two or more persons, to do an act innocent in itself, a criminal conspiracy, it is not enough that it appears that the act which was the object of the agreement was prohibited. The confederation must be corrupt." *Id.* at 92.

The *Powell* doctrine quickly "won general acceptance." *Developments in the Law–Criminal Conspiracy*, 72 Harv. L. Rev. 920, 936-37 (1959). In *Landen v. United States*, 299 F. 75 (6th Cir. 1924), for example, the Sixth Circuit overturned a conviction for conspiracy to sell liquor without the necessary permit, explaining that where the underlying offense is merely *malum prohibitum*, a conviction is improper unless there is "a 'corrupt intent,' which is interpreted to be the mens rea, the conscious and intentional purpose to break the law." *Id.* at 78-79 (citing *Powell*). Similarly, in *Cruz v. United States*, 106 F.2d 828 (10th Cir. 1939), the Tenth Circuit explained that "a corrupt motive or intent must be shown" to find defendants

guilty of conspiracy to violate the Emergency Relief Appropriation Act of 1937. *Id.* at 830; *see Fall v. United States*, 209 F. 547, 553 (8th Cir. 1913) (relying on *Powell*'s New York progeny); *Pereles v. Weil*, 157 F. 419, 422, 425-26 (E.D. Wis. 1907); *see also United States v. Previte*, 648 F.2d 73, 81-82 (1st Cir. 1981).[6] *See generally United States v. Barker*, 514 F.2d 208, 233 (D.C. Cir. 1975) (Bazelon, C.J., concurring) (collecting cases).

Although the Second Circuit expressly acknowledged the existence of a split among the Circuits, *see* Pet. App. 5a, the court minimized the continuing significance of that split. But the dispute between the Circuits remains alive. None of the decisions with which the Second Circuit has put itself in conflict has ever been questioned by the court that issued it, let alone limited or overruled–and a number of courts have continued to acknowledge and apply the *Powell* doctrine. In *United States v. Previte*, 648 F.2d 73 (1st Cir. 1981), for example, the First Circuit recognized the existence of the doctrine but found it inapplicable in a case in which the underlying substantive offense, the receipt of gratuities by a public official, required "guilty knowledge." *Id.* at 81-82. And a district court in Michigan, applying the Sixth Circuit's still authoritative 1924 decision in *Landen*, relied on the *Powell* doctrine to acquit a defendant of a charge of conspiracy to violate the Gun Control Act. *See United States v. Reminga*, 493 F. Supp. 1351, 1360-61 (W.D. Mich. 1980); *compare, e.g.*, *United States v. Mitlof*, 165 F. Supp. 2d 558, 565-68 (S.D.N.Y. 2001) (finding question left open in *Feola* at least partially

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[6] Numerous state court decisions similarly adopted the *Powell* doctrine. *See, e.g.*, *Mitchell v. State*, 27 So. 2d 36, 38 (Ala. 1946) ("A corrupt motive or intent is essential to a criminal conspiracy." (internal quotation marks omitted)); *State v. Burns*, 9 N.W.2d 518, 521 (Minn. 1943); *Commonwealth v. Benesch*, 194 N.E. 905, 910 (Mass. 1935); *Commonwealth v. Gormley*, 77 Pa. Super. 298 (1920); *Wood v. State*, 1 A. 509, 510-11 (N.J. 1885).

foreclosed by the Second Circuit decision here).[7]

Moreover, this Court has expressly reserved this very question on at least three occasions. In *United States v. Freed*, 401 U.S. 601 (1971), for example, this Court upheld a conspiracy conviction involving the acquisition and possession of hand grenades, an object that the Court described as "hardly . . . innocent in itself." *Id.* at 609 n.14. The Court flagged and set aside the issue of whether a conspiracy to carry out an innocent act that is "not known by the alleged conspirators to be prohibited must be actuated by some corrupt motive other than the intention to do the act which is prohibited and which is the object of the conspiracy." *Id.*

A year later, in *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385 (1972), this Court assumed without deciding that the *Powell* doctrine applied, and held that the doctrine would not afford petitioners greater relief than that to which they were entitled on other grounds. *See id.* at 401 n.11.

In *United States v. Feola*, 420 U.S. 671 (1975), this Court rejected a mens rea challenge to a conspiracy conviction, but noted that the underlying assault committed by the defendants was "clearly wrongful conduct." *Id.* at 691-92. The Court thus expressly declined to answer the central question posed by *Powell*: "whether it is fair to punish parties to an agreement to engage intentionally in apparently innocent conduct where the

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[7] The Second Circuit cited three cases in support of the contention that "many circuits have . . . , in effect, moved away from the doctrine" (Pet. App. 5a): *United States v. Blair*, 54 F.3d 639 (10th Cir. 1995), in which the court noted that the defendant "made no effort to distinguish" *Feola*, *id.* at 643; *United States v. Murray*, 928 F.2d 1242 (1st Cir. 1991), in which the court cited *Feola* in passing and no *Powell* issue was raised, *id.* at 1251; and *United States v. Thomas*, 887 F.2d 1341 (9th Cir. 1989), which did not mention *Powell* and which reached the anomalous conclusion that a defendant could "negligently conspir[e]," *id.* at 1347. These decisions provide dubious support for the Second Circuit's contention. To the extent that the court correctly characterized these cases as rejecting *Powell*, however, that rejection simply adds to the depth of the Circuit split.

unintended result of engaging in that conduct is the violation of a criminal statute." *Id.* at 691; *see also id.* at 688-93.

2. In rejecting the *Powell* doctrine, the Second Circuit mischaracterized the relevant inquiry and misinterpreted and ignored relevant precedent from this Court.

The Second Circuit conceded that "federal cases from the first half of the last century" incorporated the *Powell* doctrine into federal conspiracy prosecutions. The court failed to realize, however, that the early twentieth-century decisions approving of the *Powell* doctrine are not only of undiminished vitality, *see supra* pp. 11-13, but are also of crucial importance in determining the intent of the Congress that re-enacted the federal conspiracy statute. *See, e.g.*, *United States v. Dege*, 364 U.S. 51, 51, 53 (1960); *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 185-86 (1994) ("When Congress reenacts statutory language that has been given a consistent judicial construction, we often adhere to that construction in interpreting the reenacted statutory language.").

The current version of 18 U.S.C. § 371, the general federal conspiracy statute, dates from 1948.[8] At the time of that re-enactment, the federal courts had consistently applied the

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[8] Although the federal statutory proscription of conspiracy dates from 1867, *see* St. 1867, ch. 169, § 30 (Mar. 2, 1867), the current statute was enacted in 1948–when the criminal provisions of the U.S. Code first became positive law–after extensive review and revision, including specific amendments to the conspiracy law. *See, e.g.*, 18 U.S.C. § 371 Historical Notes; H.R. Rep. No. 80-304 (1947), *reprinted in* 1948 U.S. Code Cong. Serv. 2434, 2435-43 (special pamphlet ed.) (explaining revisers' consideration of "[a]pplicable constructions of the courts"); *Hearing Before Subcomm. No. 1 of the House Judiciary Comm.* (Mar. 7, 1947) (statements of Rep. Devitt, Mr. Miller), *reprinted in* 1948 U.S. Code Cong. Serv. 2686, 2688, 2698 (special pamphlet ed.) (explaining revisers' consideration of "decisions of the Supreme Court and the circuit courts"). A similar revision and enactment took place in 1909 and in 1878. *See, e.g.*, St. 1909, ch. 321, Preamble & § 37 (Mar. 4, 1909); H.R. Rep. No. 80-304, *reprinted in* 1948 U.S. Code Cong. Serv. at 2435-36.

*Powell* doctrine under the relevant statutory language. *See Landen*, 299 F. at 78-79 (noting that "the text-books and elementary discussions seem to agree" on the necessity for a corrupt intent, and explaining that the *Powell* case "has stood for 50 years as the leading one on the subject, and . . . has never, so far as we find, been questioned"); *see also Cruz*, 106 F.2d at 830; *Fall*, 209 F. at 553; *Pereles*, 157 F. at 422, 425-26; *see also generally Keegan v. United States*, 325 U.S. 478, 493-94 (1945); *United States v. Crimmins*, 123 F.2d 271, 273 (2d Cir. 1941); *Barker*, 514 F.2d at 233 (Bazelon, C.J., concurring); 2 Francis Wharton, *A Treatise on Criminal Law* § 1606, at 1749-50 (11th ed. 1912).[9] Further, numerous state courts had adopted *Powell* prior to the re-enactment of the federal conspiracy statute. *See generally Developments*, *supra*, at 936-37.

The other justifications offered by the Second Circuit for its rejection of *Powell* similarly cannot survive scrutiny. The court of appeals suggested, for example, that *Feola* "rejected the notion that a federal conspiracy conviction required proof of *scienter*," Pet. App. 7a, but the court failed to acknowledge that *Feola* itself disclaimed any intent to decide the *Powell* question.

The Second Circuit also cited a suggestion from the American Law Institute that *Powell* rests on a "melodramatic and sinister view of conspiracy." Pet. App. 6a-7a. To the contrary, however, the *Powell* doctrine is solidly grounded in the policies identified by this Court as underlying the law of conspiracy: "protection of society from the dangers of concerted criminal activity," *Feola*, 420 U.S. at 693, the need

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[9] Those few federal cases that did not fall into this category spoke in dicta, and at least one of them was expressly characterized that way in a later decision by the same court. *See Landen*, 299 F. at 79 (discussing *Chadwick v. United States*, 141 Fed. 225 (6th Cir. 1905), and *Hamburg-American Steam Packet Co. v. United States*, 250 F. 747 (2d Cir. 1918)); *Developments*, *supra*, at 936-37 & n.93 (discussing *Chadwick*, *Hamburg-American*, and *United States v. Mack*, 112 F.2d 290 (2d Cir. 1940)); *see also Keegan*, 325 U.S. at 506 (Stone, C.J., dissenting).

for "preventative action" once "[c]riminal intent" to commit a substantive crime has "crystallized," *id.* at 694, the difficulty of detecting activity that is likely to be "characterized by secrecy," *United States v. Rabinowich*, 238 U.S. 78, 88 (1915), and prevention of "crimes unrelated to the original purpose for which the group was formed," *Callanan v. United States*, 364 U.S. 587, 593-94 (1961). When a defendant such as Mr. Cohen agrees to carry out acts that are innocent in themselves, and the "conspirators" do not have actual knowledge that the acts are forbidden, there is no threat that the group will provide an "education in crime" or move on to other, more dangerous projects, or that it will conceal the very activities that it believes to be wholly innocuous. *See, e.g.*, *Developments*, *supra*, at 936 (explaining that "it is difficult to say that a grouping is inherently antisocial and poses a continuing threat merely because a contemplated act which it thinks to be lawful is in fact unlawful"); *Reminga*, 493 F. Supp. at 1361.

Indeed, the instant case illustrates the wisdom of the *Powell* doctrine. Far from "characterized by secrecy," Mr. Cohen's "conspiracy" has been entirely open: it has been advertised globally, featured in the *Wall Street Journal*, debated on national television, and publicly described in voluntary written testimony to Congress. Nor is there the slightest suggestion that Mr. Cohen or his colleagues are connected in any way to any criminal activity (apart from the present convictions). Under these circumstances, unless some corrupt motive is required for conviction, the "policies behind the imposition of conspiratorial liability [are] not served." *Feola*, 420 U.S. at 693.

Finally, the Second Circuit's rejection of the *Powell* doctrine is in tension with this Court's decision in *Keegan v. United States*, 325 U.S. 478 (1945), a case that was cited to the Second Circuit but ignored entirely in its opinion. In *Keegan*, the defendants explicitly relied on *Powell* in challenging their convictions under the Selective Service Act of 1940 for conspiracy to knowingly counsel evasion of military service,

contending that they lacked the requisite corrupt motive because they intended only to create a test case to challenge the Act. In addition to finding insufficient evidence to support a finding that the defendants counseled "evasion," the lead opinion implicitly endorsed the "corrupt motive" view of conspiracy, criticizing a jury charge that stated that "innocent motives and a desire to test the validity of the law were not a defense," and explaining that such a charge meant "nothing short of this . . . : If defendants had innocent motives they are nonetheless guilty; if they had guilty motives they, of course, are guilty." *Id.* at 494 (opinion of Roberts, Frankfurter, and Murphy, JJ.).[10]

3. Re-examination of *Keegan* and resolution of the disagreement between the Circuits as to the issue left unanswered by *Feola* are important tasks with broad implications. The number of conspiracy prosecutions for violations of § 1084 through operation of a business similar to Mr. Cohen's has recently increased and is likely to continue to do so. *See, e.g.*, Adrian Goss, *Jay Cohen's Brave New World: The Liability of Offshore Operators of Licensed Internet Casinos for Breach of United States' Anti-Gambling Laws*, 7 Rich. J.L. & Tech. 32, 78 (2001) (quoting Attorney General Reno's statement that operators "can't hide online, and . . . can't hide offshore"). The divergence between the approaches of the different Circuits to the *Powell* doctrine invites forum-shopping by prosecutors, especially when their target is one of the many businesses like WSE that operate over the Internet and thus reach into numerous jurisdictions. The same rule of criminal conspiracy law ought to apply to such a business (and its employees) regardless of which jurisdiction the government chooses as the locus of undercover wire transmissions.

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[10] The dissent in *Keegan* took pains to distinguish *Powell*, arguing that the underlying prohibited act was "hardly innocent in itself" and asserting that the *Powell* doctrine "has never been accepted by this Court." *Id.* at 506 (Stone, C.J., dissenting).

More generally, it remains true, more than 75 years after Judge Learned Hand first made the observation, that conspiracy is the "darling of the modern prosecutor's nursery." *Harrison v. United States*, 7 F.2d 259, 263 (2d Cir. 1925). Thousands of defendants are subject to federal prosecution pursuant to § 371 each year. *See, e.g.*, Beth Allison Davis & Josh Vitullo, *Federal Criminal Conspiracy*, 38 Am. Crim. L. Rev. 777, 778 n.9 (2001). Given the wide range of *mala prohibita* offenses, a number of these cases have presented and will present–outside of the § 1084 context–the issue reserved in *Feola* and squarely raised by the case at hand. *See, e.g.*, *Mitlof*, 165 F. Supp. 2d at 565-68; *see also* John Shepard Wiley Jr., *Not Guilty By Reason of Blamelessness*, 85 Va. L. Rev. 1021, 1061-62 (1999).

Finally, this case "stirs large questions–questions that go to the moral foundations of the criminal law. Whether postulated as a problem of 'mens rea,' of 'willfulness,' of 'criminal responsibility,' or of 'scienter,' the infliction of criminal punishment upon the unaware has long troubled the fair administration of justice." *International Minerals*, 402 U.S. at 565 (Stewart, J., dissenting). The *Powell* issue is directly presented and preserved here, and the Court should take this opportunity to elucidate the mens rea requirements of the federal conspiracy statute and to resolve the disagreement among the Circuits by finally clarifying the scope of *Keegan* and answering the question expressly left open by *Feola*, *Freed*, and *Pipefitters*.

**B. The Second Circuit's Interpretation of § 1084 Squarely Conflicts with Numerous Decisions of this Court and the Courts of Appeals, Erroneously Resolves Several Provisions of a Critically Important Statute, and Effectively Criminalizes Innocent Conduct.**

1. *The Second Circuit's holding that "legal" incorporates violation of both criminal and civil law conflicts with numerous decisions of the Circuits and is unsupportable.*

Section 1084(b)'s safe harbor removes from § 1084(a) the

"transmission of information assisting in the placing of bets or wagers" when the information is transmitted to and from a State or foreign country in which "such betting is legal." 18 U.S.C. § 1084(b). There is no dispute that betting is legal–indeed, actively licensed and encouraged–in Antigua, where Mr. Cohen's business was wholly located. The only question, then, is whether such betting is "legal" in New York. The court of appeals answered this question by relying only on non-criminal provisions of New York law: the New York Constitution, which sets forth a general policy but is not self-enforcing, and a provision of New York's civil statutes that provides generally that "[a]ll wagers, bets or stakes . . . shall be unlawful." Pet. App. 8a, 15a (citing N.Y. Const. art. I, § 9 and N.Y. Gen. Oblig. L. § 5-401). In doing so, the court not only created a conflict with a decision of the First Circuit involving § 1084, *Sterling Suffolk Racecourse Ltd. Partnership v. Burrillville Racing Ass'n*, 989 F.2d 1266 (1st Cir. 1993), and with decisions of other Circuits regarding similar gambling-related federal criminal statutes, but also effectively criminalized conduct that the States have determined should not be criminalized, thereby seriously undermining Congress' deliberate effort to preserve comity with the States.

In *Sterling*, the First Circuit considered a dispute between a race track and an off-track betting ("OTB") facility involving a civil RICO claim that alleged a violation of § 1084 as the required indictable predicate offense. The track alleged that the OTB facility's conduct could not be "legal" in the relevant states for the purposes of § 1084(b) because it violated the federal Interstate Horseracing Act ("IHA"), 15 U.S.C. §§ 3001-3007. The First Circuit rejected that argument, noting that the IHA had "purely civil consequences" and that its remedies did not include "the specter of criminal penalties." *Sterling*, 989 F.2d at 1273. The First Circuit continued: "[W]e think it clear that Congress, in adopting section 1084, did not intend to criminalize acts that neither the affected states nor Congress

itself deemed criminal in nature. [Defendant's] acts fall into this chiaroscuro category–perhaps not right, but certainly not felonious. It follows that these acts [are] not indictable under section 1084 . . . ." *Id.*; *see also, e.g.*, *United States v. Kelley*, 254 F. Supp. 9, 15 (S.D.N.Y. 1966) (noting that § 1084 sought to curtail use of the wires "to violate state *penal* statutes" (emphasis added)), *aff'd in part, rev'd in part on other grounds*, 395 F.2d 727 (2d Cir. 1968).

The Second Circuit attempted to distinguish *Sterling* on the ground that the First Circuit "did not speak in the context of a criminal prosecution." Pet. App. 9a. But this is a distinction without a difference. In order to dispose of the RICO claim, the First Circuit had to (and did) resolve the question whether the challenged conduct constituted an indictable offense under § 1084–and it did so in precisely the manner that was urged by Mr. Cohen and rejected by the Second Circuit.

The Second Circuit's decision is also inconsistent with the Ninth Circuit's decision in *United States v. Gordon*, 464 F.2d 357 (9th Cir. 1972) (per curiam), interpreting 18 U.S.C. § 1955. Section 1955 makes it criminal to conduct an "illegal gambling business," defined by statute to mean a business that "is a violation of the law of a State or political subdivision in which it is conducted." Applying the rule of lenity, the Ninth Circuit held that the pivotal words "the law of a State" should be construed to cover only gambling businesses that are "in violation of state penal laws." *Id.* at 358. The Eighth Circuit recently applied *Gordon* to dispose of a civil RICO claim premised on an alleged violation of § 1955. *See People ex rel. Small v. Harrah's-North Kansas City Corp.*, 208 F.3d 218 (8th Cir. 2000) (unpub. table op.) (citing *Gordon* for proposition that a "gambling business must violate state criminal law, rather than civil law, to fall within prohibition in 18 U.S.C. § 1955"). *Cf. United States v. Hagen*, 951 F.2d 261, 263-64 (10th Cir. 1991) (assuming *arguendo* that state law violation under § 1955 must be "penal"); *United States v. Stewart*, 205 F.3d 840, 842

(5th Cir. 2000) (same).[11]

Similarly, a number of Circuits have found that 18 U.S.C. § 1952 (the "Travel Act"), which was enacted on the same day as § 1084 and which forbids interstate travel involving gambling (and other activities) "in violation of the laws of the [relevant] State," is not transgressed by mere violation of a state regulation, and a number of courts have also stated that a state criminal provision must be at issue. *See, e.g., United States v. DeLuna*, 763 F.2d 897, 907 (8th Cir. 1985); *United States v. Finazzo*, 704 F.2d 300, 307 (6th Cir. 1983); *United States v. Polizzi*, 500 F.2d 856, 872-75 (9th Cir. 1974); *United States v. Ferber*, 966 F. Supp. 90, 102 (D. Mass. 1997). *Cf. United States v. Nardello*, 393 U.S. 286, 290-91, 295 (1969) (assuming that relevant state law under the Travel Act consists of state "criminal prohibitions").

These decisions recognize that the statutes in question, all of which have the same underlying purposes and should thus be interpreted *in pari materia*, should not be strictly construed *against* defendants in order to make the severe consequences of federal criminal liability hinge on whether or not a defendant has complied with a State's civil law. *Cf. Rewis v. United States*, 401 U.S. 808, 812 (1971) (interpreting § 1952 to avoid "transform[ing] relatively minor state offenses into federal felonies"). Under this absurd view of § 1084, a defendant could be convicted of a federal felony because he neglected to renew a state license to conduct a particular kind of betting business, or because he ran afoul of a state civil statute governing betting on particular sporting events. As the Ninth Circuit recognized in the analogous § 1955 context, this Court's decisions explicating the rule of lenity forbid such extraordinary results unless Congress plainly requires them. *See, e.g., Huddleston v.*

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[11] *Cf. also California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 213-14 (1987) (reserving the question whether state law violated under § 1955 must be "prohibitory" rather than "regulatory").

*United States*, 415 U.S. 814, 831 (1974); *see also United States v. Lanier*, 520 U.S. 259, 266 (1997).

The legislative history of § 1084 confirms that Congress did not contemplate such a result. Section 1084 was intended "to assist the various States . . . in the enforcement of their laws pertaining to gambling, bookmaking, and like *offenses* and to aid in the suppression of organized gambling activities"–the latter a reference to the overarching legislative purpose of "combat[ing] organized crime and racketeering." H.R. Rep. No. 87-967, at 2-4 (1961) (emphasis added); S. Rep. No. 87-588, at 2-3 (1961). *Cf. Erlenbaugh v. United States*, 409 U.S. 239, 245 (1972) (explaining that §§ 1952 and 1953 were "parts of a comprehensive federal legislative effort to assist local authorities in dealing with organized criminal activity" (footnote omitted)); *Nardello*, 393 U.S. at 290-91 (explaining that § 1952 was intended "to aid local law enforcement" combating a "criminal operation").

The Second Circuit's decision turns this purpose on its head, criminalizing conduct even when the States and foreign governments involved in the transaction have determined that the conduct does not warrant criminal sanction. *See Rewis*, 401 U.S. at 812 (discussing wisdom of avoiding a statutory interpretation that "would alter sensitive federal-state relationships"). In the process, the instant decision also threatens the many businesses like WSE, which have an Internet presence in numerous jurisdictions, with federal criminal prosecution in the Circuit that interprets "legal" most broadly.

2. *The Second Circuit's decision regarding the mens rea necessary for a violation of § 1084 conflicts with principles in this Court's decisions and further unsettles an area of the law as to which the Circuits are in disarray.*

In § 1084, Congress created a critical distinction between the transmission of information assisting in the placing of bets and wagers–which is subject to § 1084(b)'s safe harbor–and the transmission of bets and wagers themselves–which is not. Mr.

Cohen argued at trial and on appeal that congressional intent and bedrock principles of criminal law required the government to prove that he knew the transmissions involved the former, and not the latter. The court of appeals rejected this argument, holding that Mr. Cohen's belief that the transmissions in question involved only information and not actual bets "was irrelevant to the issue of his mens rea under § 1084." Pet. App. 13a. This holding exacerbates an existing conflict among the courts of appeals regarding the mens rea required under § 1084 and creates a conflict with several decisions of this Court.

The proper mens rea required by § 1084 is an issue that has left the Circuits in disarray. In *Cohen v. United States*, 378 F.2d 751 (9th Cir. 1967), for example, the Ninth Circuit held that "Congress intended knowledge of the statutory prohibition to be an element of the offense under § 1084(a)." *Id.* at 757. The Eleventh Circuit pattern jury instructions also impose a "willfulness" requirement for violation of § 1084. *See* Pattern Jury Instructions of the District Judges Association of the Eleventh Circuit, Criminal Cases, Offense Instruction Nos. 9.1, 37 (1997). But the Tenth Circuit–reaching the same conclusion as the Second Circuit here–has expressly disagreed with the Ninth Circuit's *Cohen* decision and held that "the plain language of the statute clearly evinces Congress's judgment that general intent is the *mens rea* needed to establish a violation of § 1084." *United States v. Blair*, 54 F.3d 639, 641-42 (10th Cir. 1995); *see also* Pet. App. 13a. This Court should correct this intolerable situation–where Mr. Cohen's conviction would have been overturned in the Ninth and Eleventh Circuits and sustained in the Tenth and Second Circuits, and where businesses with a nationwide reach can be held to the strictest available interpretation of federal law through the government's choice of forum.

Resolution of this conflict is particularly appropriate in this case because the Second Circuit ignored critical precedent from this Court. There is no dispute that the "knowingly"

requirement extends to every element of the § 1084 offense, *see United States v. X-Citement Video, Inc.*, 513 U.S. 64, 71 (1994); the question here is what it means to "knowingly" transmit "bets or wagers" when those terms are not defined by the criminal statute itself. The Second Circuit held that Mr. Cohen need only know that he was doing the "deeds forbidden by § 1084." Pet. App. 13a. But this Court has previously required the government to prove knowledge of an element of the offense even when that element incorporates a legal conclusion. *See generally* Glanville Williams, *Criminal Law: The General Part* 332-45 (2d ed. 1961); *see also Freed*, 401 U.S. at 615-16 (Brennan, J., concurring) ("[T]he definition of the crime, as written by Congress, requires proof of circumstances that involve a legal element . . . . The law involved is not the law defining the offense; it is some other legal rule that characterizes the attendant circumstances that are material to the offense." (internal quotation marks omitted)).

In *Liparota v. United States*, 471 U.S. 419 (1985), for example, this Court interpreted 7 U.S.C. § 2024(b)(1), which criminalized knowing use or transfer of food stamps "in any manner not authorized by [the statute] or the regulations," to require knowledge that the use or transfer was in fact unauthorized by law. *See id.* at 425-26. The Court explained that this interpretation, which was grounded in the rule of lenity and in the canon that a statute should not be interpreted to "criminalize a broad range of apparently innocent conduct," *id.* at 426-28, did not create a mistake of law defense:

> Our holding today no more creates a 'mistake of law' defense than does a statute making knowing receipt of stolen goods unlawful. . . . *In both cases, there is a legal element in the definition of the offense.*

*Id.* at 426 n.9 (emphasis added). The Court thus concluded that although "it is not a defense to a charge of a § 2024(b)(1) violation that one did not know that possessing food stamps in a manner unauthorized by statute or regulations was illegal," it

"is a defense to a charge of a § 2024(b)(1) violation that one did not know that one's possession was unauthorized." *Id.*

Similarly, in *Morissette v. United States*, 342 U.S. 246 (1952), this Court overturned a conviction for "knowingly convert[ing]" government property when the defendant was unaware of the legal fact that even apparently unclaimed items found on private property cannot properly be considered abandoned. *See id.* at 271, 275-76; *Liparota*, 471 U.S. at 426 n.9 (explaining that *Morissette* held that "it is a defense to a charge of 'knowingly converting' federal property that one did not know that what one was doing was a conversion"); *see also United States v. Baker*, 63 F.3d 1478, 1491 (9th Cir. 1995) (recognizing defense "where the defendant is ignorant of an independently determined legal status or condition that is one of the operative facts of the crime" (internal quotation marks omitted)).

These decisions reflect the fact that, while it may be proper to assume that every person is familiar with the criminal law, it is unfair to require of the average citizen a complete knowledge of the civil law as well, on pain of criminal sanctions. *See* Williams, *supra*, at 334; *United States v. Barker*, 546 F.2d 940, 969 & n.49 (D.C. Cir. 1976) (Leventhal, J., dissenting) (noting that mistake of law "may be accepted where the mistake pertains to a violation of purely civil law as contrasted with the requirements of the criminal law"). Here, the statute does not define "bets or wagers," and the meaning of the term is not readily apparent, especially in an "account wagering" system like the one used by WSE and by OTB operations.[12] Instead, there is a large body of state law addressing when a transaction constitutes a bet or wager, much of which incorporates contract

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[12] *Compare, e.g., Staples v. United States*, 511 U.S. 600, 602, 619 (1994) (involving statute in which crucial term "firearm" had a statutory definition, so that ignorance of the content of that definition would effectively have been ignorance of the federal criminal law at issue).

law principles of offer, acceptance, and consideration. *See, e.g.*, *McQuesten v. Steinmetz*, 58 A. 876, 877 (N.H. 1904); *Lescallett v. Commonwealth*, 17 S.E. 546, 547-48 (Va. 1893); Minn. Stat. § 609.75; Or. Rev. Stat. § 462.142(2); *see also Saratoga Harness Racing, Inc. v. City of Saratoga Springs*, 390 N.Y.S.2d 240, 241-42 (N.Y.A.D. 1976), *aff'd*, 380 N.E.2d 163 (N.Y. 1978). *Cf. FCC v. American Broad. Co.*, 347 U.S. 284, 293-94 (1954). *Liparota* and *Morissette* are thus controlling.

The Second Circuit's refusal to recognize the import of Mr. Cohen's good faith belief that the transmissions were not "bets or wagers" is especially troubling in light of the line Congress drew between bets or wagers and information assisting in the placing of bets or wagers. For many defendants–including Mr. Cohen–this line marks the boundary between criminal conduct and completely innocent conduct. In such a situation, it is particularly important to engage in the analysis set forth in *Liparota*, including consideration of the rule of lenity, in order to determine exactly the mens rea that the statute requires, lest the statute's careful distinction be effectively written out of it. *See, e.g.*, *X-Citement Video*, 513 U.S. at 69, 72; *Liparota*, 471 U.S. at 426-29. *See generally McBoyle v. United States*, 283 U.S. 25, 27 (1931) ("[A] fair warning should be given . . . of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.").

Moreover, Mr. Cohen's belief that the relevant transmissions were not "bets or wagers" was not mere idiosyncrasy; indeed, contrary to the opinion below, the statute is best read to require that conclusion.

The common law clearly indicates that a bet takes place where it is accepted–in Mr. Cohen's case, in Antigua–and that there is a strong distinction between offers to bet and bets themselves. For instance, in *Lescallett v. Commonwealth*, 17 S.E. 546 (Va. 1893), the court held that a bet "involves a concurrence of wills; that is, there must be an offer to bet made on one side, and accepted on the other. When the offer is

accepted, and not before, the betting becomes complete. . . . If . . . an offer to bet is telegraphed by a person in this city to another in New York, and the latter accepts by telegraph, the betting is done . . . in New York, because the offer, being accepted there, takes effect there." *Id.* at 547-48; *see also, e.g.*, *McQuesten*, 58 A. at 876-77; *Saratoga Harness*, 390 N.Y.S.2d at 242. *Cf. United States v. Truesdale*, 152 F.3d 443, 447-49 (5th Cir. 1998).

This body of case law demonstrates that an offer to bet–a set of wagering instructions which may or may not be accepted by the party at the receiving end of the transmission–cannot be regarded as synonymous with the bet itself. The same must therefore be true of the transmission that takes place when account wagering is employed, because an account wagering system requires various confirmations before a wagering offer is accepted and because the required consideration is not part of the exchange across the wires.

This is the premise that permits the long-standing practice of account wagering on horse races by state-authorized off-track betting facilities. This large and well-established area of business was founded on the hitherto unchallenged understanding that when a customer in one State establishes an account with an OTB facility in a different State, and then contacts the OTB facility by telephone with instructions on how the money in that account should be used for the placement of a bet, only "information assisting in the placing of bets or wagers" is transmitted between the two States.[13] If calls to an

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[13] *See, e.g.*, Cal. Bus. & Prof. Code § 19604 (stating that "'advance deposit wagering' means a form of parimutuel wagering in which a person residing within California or outside of this state establishes an account . . . and subsequently issues wagering instructions concerning the funds . . . , thereby authorizing the entity holding the account to place wagers on the account owner's behalf"); Or. Rev. Stat. § 462.142; Or. Admin. R. § 462-220-0020(2), -0060; N.Y. Rac. Pari-Mut. Wag. & Breed. Law § 1012; 4 Pa. Cons. Stat. § 325.218; 58 Pa. Code § 169.3.

OTB facility actually transmit bets and not mere information authorizing bets (as the Second Circuit's opinion requires), then a significant portion of OTB transactions are ineligible for § 1084(b)'s safe harbor and are thus *per se* violations of § 1084, regardless of their apparent validity under state law. That cannot possibly be what Congress intended. *Cf. Dowling v. United States*, 473 U.S. 207, 227 (1985) ("[T]he rationale supporting application of the statute under the circumstances of this case would equally justify its use in wide expanses of the law which Congress has evidenced no intention to enter by way of criminal sanction.").[14] Indeed, at the end of 2000–before the Second Circuit's decision in this case–Congress amended the IHA to make clear its intent to regulate precisely the form of account wagering at issue here.[15] It is inconceivable that Congress could have intended to regulate conduct that was–as the Second Circuit's opinion suggests–*per se* unlawful under § 1084.

The Second Circuit's view that the transmissions at issue here involved bets or wagers is thus inconsistent with well-established law regarding the content and locus of a "bet" and with decades of practice in the OTB industry, where interstate telephone account wagering has been carried out with the full knowledge of the federal government and the active approval of numerous states. But even if the Second Circuit were correct in this regard, Mr. Cohen's good faith belief that he was not

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[14] There is no dispute that the account wagering carried out by WSE is identical to the kind of wagering carried out by OTB, on which Mr. Cohen's business was specifically modeled. WSE elected to confine its business to account wagering precisely to ensure that only "information assisting in the placing of bets or wagers" was transmitted.

[15] The amendment adds to the definition of a regulated "interstate off-track wager" a pari-mutuel wager, "where lawful in each State involved, placed or transmitted by an individual in one State via telephone or other electronic media and accepted by an off-track betting system in . . another State." 15 U.S.C. § 3002(3).

transmitting bets or wagers was a defense to the charge, and the Second Circuit's contrary holding merits this Court's review.

3. *The issues raised by the Second Circuit's erroneous interpretation of § 1084 are critically important.*

The Second Circuit's erroneous construction of § 1084 presents issues of national and international importance. The off-shore wagering industry is flourishing and, particularly since everyday sports betting is common in countries such as Great Britain, much of the traffic is generated by Americans. *See* Marc Falcone, Bear, Stearns & Co., *Gaming Industry* 12 (Mar. 2001). In 2000, an estimated $1.5 billion was wagered on the Internet, of which approximately $553.3 million was wagered on sporting events, and those amounts are estimated to have nearly doubled in 2001; the number of websites that offer wagering is now believed to be 1,200 to 1,400, half of which have appeared in just the last year. *See* Falcone, *supra*, at 6, 48. In Antigua and Barbuda alone, there are more than 50 on-line sportsbooks in current operation, *see* http://www.tbwsport.com/bookmakers/america.html, and more than 50 jurisdictions all over the world license and regulate sports betting websites and wagering operations. *See* Mike Brunker, *On-Line Gambling Goes Global*, MSNBC, Apr. 10, 2001, *at* http://www.msnbc.com/news/544764.asp?0sp =n6b1b1.

Against this backdrop, and with the Department of Justice committed to vigorously prosecuting these ventures, it is critical that this Court intervene to ensure that § 1084 is given a uniform and proper construction. First, this industry's use of the Internet means that it reaches into many jurisdictions throughout the country, and inconsistent interpretation of § 371 and § 1084 by different courts of appeals is therefore a highly salient current problem. The divergence in the law among the different Circuits–in application of the *Powell* doctrine and construction of the scope of § 1084–places the operators of businesses such as WSE in an untenable position, and invites the government to make calculated choices about the

jurisdiction in which investigation and prosecution should be pursued.

Second, the decision of the Second Circuit–now a far more attractive venue for prosecutors in § 1084 cases than, for instance, the Sixth Circuit or the Ninth Circuit–has the effect of criminalizing entirely innocent conduct. Mr. Cohen left a lucrative position at Group One to start an Internet business. As the above statistics indicate, he was not alone. Mr. Cohen and his fellow entrepreneurs have seen their businesses and their reputations tarnished, and face the prospect of jail, for conduct that appeared entirely innocent and that Congress did not intend to criminalize. The effect on these individuals and their industry cannot be overstated.

Finally, the Second Circuit's decision threatens substantial harm to the OTB industry. Several States, including New York, Oregon, and California, permit out-of-state individuals to establish wagering accounts and direct placement of bets from those accounts via telephone or Internet. *See supra* note 13. Account wagering is responsible for a sizable portion of the OTB business. In 1998, billions of dollars were wagered with state-authorized off-track betting facilities; of this amount, account wagering accounted for over $500 million, and a significant amount of total account wagering "handle" was generated by out-of-state account holders. This account wagering has only expanded in the last few years. *See, e.g.*, National Gambling Impact Study Comm'n, *Final Report* 2-11 (1999); Alex Wong, *Racetracks Try to Get Handle on Net Wagers*, Lexington Herald Leader, Aug. 28, 2001, at C1. Particularly in light of congressional intent to regulate the precise form of OTB activity at issue here, *see supra* p. 28, the Second Circuit's decision, which contains no exception for pari-mutuel betting, cannot stand.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 22, 2002

# APPENDIX A

United States Court of Appeals, Second Circuit

UNITED STATES of America, Appellee,
v.
Jay COHEN, Defendant Appellant.

No. 00-1574

Argued: May 21, 2001
Decided: July 31, 2001

Before: LEVAL and PARKER, Circuit Judges, and KEENAN,[1] District Judge.

KEENAN, District Judge:

*BACKGROUND*

In 1996, the Defendant, Jay Cohen ("Cohen") was young, bright, and enjoyed a lucrative position at Group One, a San Francisco firm that traded in options and derivatives. That was not all to last, for by 1996 the Internet revolution was in the speed lane. Inspired by the new technology and its potential, Cohen decided to pursue the dream of owning his own e-business. By year's end he had left his job at Group One, moved to the Caribbean island of Antigua, and had become a bookmaker.

Cohen, as President, and his partners, all American

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[1] The Honorable John F. Keenan, United States District Judge for the Southern District of New York, sitting by designation.

citizens, dubbed their new venture the World Sports Exchange ("WSE"). WSE's sole business involved bookmaking on American sports events, and was purportedly patterned after New York's Off-Track Betting Corporation.[2] WSE targeted customers in the United States, advertising its business throughout America by radio, newspaper, and television. Its advertisements invited customers to bet with WSE either by toll-free telephone or by internet.

WSE operated an "account-wagering" system. It required that its new customers first open an account with WSE and wire at least $300 into that account in Antigua. A customer seeking to bet would then contact WSE either by telephone or internet to request a particular bet. WSE would issue an immediate, automatic acceptance and confirmation of that bet, and would maintain the bet from that customer's account.

In one fifteen-month period, WSE collected approximately $5.3 million in funds wired from customers in the United States. In addition, WSE would typically retain a "vig" or commission of 10% on each bet. Cohen boasted that in its first year of operation, WSE had already attracted nearly 1,600 customers. By November 1998, WSE had received 60,000 phone calls from customers in the United States, including over 6,100 from New York.

In the course of an FBI investigation of offshore bookmakers, FBI agents in New York contacted WSE by telephone and internet numerous times between October 1997 and March 1998 to open accounts and place bets. Cohen was arrested in March 1998 under an eight-count indictment

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[2] We note, however, that the Off-Track Betting Corporation's business is limited to taking bets on horseracing, not other sporting events.

charging him with conspiracy and substantive offenses in violation of 18 U.S.C. § 1084 ("§ 1084"). That statute reads as follows:

> (a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both.
>
> (b) Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State or foreign country where betting on that sporting event or contest is legal into a State or foreign country in which such betting is legal.

*See* § 1084(a)-(b). In the conspiracy count (Count One) and in five of the seven substantive counts (Counts Three through Six, and Eight), Cohen was charged with violating all three prohibitive clauses of § 1084(a) ((1) transmission in interstate or foreign commerce of bets or wagers, (2) transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, (3) information assisting in the placement of bets or wagers). In two counts, Counts Two and Seven, he was charged only with transmitting "information assisting in the placing of bets or wagers."

Cohen was convicted on all eight counts on February 28, 2000 after a ten-day jury trial before Judge Thomas P. Griesa. The jury found in special interrogatories that Cohen had violated all three prohibitive clauses of § 1084(a) with respect to the five counts in which those violations were charged. Judge Griesa sentenced Cohen on August 10, 2000 to a term of twenty-one months' imprisonment. He has remained on bail pending the outcome of this appeal.

## *DISCUSSION*

On appeal, Cohen asks this Court to consider the following six issues: (1) whether the Government was required to prove a "corrupt motive" in connection with the conspiracy in this case; (2) whether the district court properly instructed the jury to disregard the safe-harbor provision contained in § 1084(b); (3) whether Cohen "knowingly" violated § 1084; (4) whether the rule of lenity requires a reversal of Cohen's convictions; (5) whether the district court constructively amended Cohen's indictment in giving its jury instructions; and (6) whether the district court abused its discretion by denying Cohen's request to depose a foreign witness. We will address those issues in that order.

### *I. Corrupt Motive*

Cohen appeals his conspiracy conviction on the grounds that the district court instructed the jury to disregard his alleged good-faith belief about the legality of his conduct. He argues that *People v. Powell*, 63 N.Y. 88 (1875), requires proof of a corrupt motive for any conspiracy to commit an offense that is *malum prohibitum*, rather than *malum in se*. We disagree, and we hold that whatever remains of *Powell* does not apply to this case.

In 1875, the New York Court of Appeals ruled in *Powell* that a conspiracy to commit an offense that was "innocent in itself" required evidence of a "corrupt" or "evil purpose." *Id.* at 92. The *Powell* defendants were commissioners of charities for Kings County and had been convicted of conspiring to violate state law by purchasing supplies without first advertising for proposals and awarding a contract to the lowest bidder. *Id.* at 89-90.

The *Powell* Court upheld an appellate court's reversal of the trial court, which had ruled that ignorance of the law was no defense to conspiracy. *Id.* at 89. In doing so, the Court concluded that a conspiracy offense, by nature, required some form of corrupt motive, even if its underlying substantive offense required only an intent to commit the prohibited act. *Id.* at 92. The Court stated that "[p]ersons who agree to do an act innocent in itself, in good faith and without the use of criminal means, are not converted into conspirators [] because it turns out that the contemplated act was prohibited by statute." *Id.*

The *Powell* doctrine was echoed in federal cases from the first half of the last century, but many circuits have since, in effect, moved away from the doctrine. *Compare, e.g., Landen v. United States*, 299 F. 75 (6th Cir. 1924) (applying *Powell* to drug wholesalers' conspiracy to sell intoxicating liquor for nonbeverage purposes without the necessary permit), *with United States v. Blair*, 54 F.3d 639 (10th Cir. 1995) (involving, as does this case, offshore bookmaking in violation of § 1084); *United States v. Murray*, 928 F.2d 1242 (1st Cir. 1991) (involving an illegal gambling business in violation of 18 U.S.C. § 1955); *United States v. Thomas*, 887 F.2d 1341 (9th Cir. 1989) (involving trafficking in wildlife that the defendant should have known was taken in violation of state law).

Although this Court has long expressed its discontent with the *Powell* doctrine, we have done so in *dicta* in cases involving conspiracies to commit acts that were not "innocent in themselves." *See, e.g., United States v. Mack*, 112 F.2d 290, 292 (2d Cir. 1940). In *Mack*, Judge Learned Hand criticized the *Powell* doctrine as "anomalous" and questioned "why more proof should be necessary than that the parties had in contemplation all the elements of the crime they are charged with conspiracy to commit." *Id.* He nevertheless found "'corrupt motive' in abundance" in connection with the defendant's conspiracy to employ unregistered alien prostitutes. *Id.*; *see also United States v. Eisenberg*, 596 F.2d 522, 526 (2d Cir. 1979) ("It being clearly established that requisite knowledge was proved for conviction of the substantive offense, it now follows that the same knowledge is enough as well to establish the conspiracy to commit the substantive offense."); *Hamburg-American Steam Packet Co. v. United States*, 250 F. 747, 759 (2d Cir. 1918) ( "[W]e are satisfied that as to the crime of conspiracy, . . . it is not necessary to show that the defendants who are alleged to have conspired to do an act which is only malum prohibitum had knowledge of the unlawfulness of the act.")

The American Law Institute has expressly rejected *Powell* in its commentary to the Model Penal Code. *See* Model Penal Code § 5.03 note on subsec. 1 & cmt. 2(c)(iii) (1985). The Institute noted that the "melodramatic and sinister view of conspiracy" upon which *Powell* was premised is no longer valid. *Id.* at cmt. 2(c)(iii). It further observed that *Powell* now has "little resolving power in particular cases" and instead "serves mainly to divert attention from clear analysis of the *mens rea* requirements of conspiracy." *Id.*

In the Institute's view, the *Powell* doctrine was essentially

"a judicial endeavor to import fair mens rea requirements into statutes creating regulatory offenses that do not rest on traditional concepts of personal fault and culpability." *See id.* The Institute itself disagreed with that policy, however, concluding that it was a function better left to the statutes themselves. *Id.*

In *United States v. Feola*, 420 U.S. 671, 95 S. Ct. 1255, 43 L. Ed. 2d 541 (1975), the Supreme Court, in another context, rejected the notion that a federal conspiracy conviction required proof of *scienter.* We conclude that the *Powell* doctrine does not apply to a conspiracy to violate 18 U.S.C. § 1084.

*II. The Safe Harbor Provision*

Cohen appeals the district court for instructing the jury to disregard the safe-harbor provision contained in § 1084(b). That subsection provides a safe harbor for transmissions that occur under both of the following two conditions: (1) betting is legal in both the place of origin and the destination of the transmission; and (2) the transmission is limited to mere information that assists in the placing of bets, as opposed to including the bets themselves. *See* § 1084(b).

The district court ruled as a matter of law that the safe-harbor provision did not apply because neither of the two conditions existed in the case of WSE's transmissions. Cohen disputes that ruling and argues that both conditions did, in fact, exist. He argues that betting is not only legal in Antigua, it is also "legal" in New York for the purposes of § 1084. He also argues that all of WSE's transmissions were limited to mere information assisting in the placing of bets. We agree with the district court's rulings on both issues.

*A. "Legal" Betting*

There can be no dispute that betting is illegal in New York. New York has expressly prohibited betting in both its Constitution, *see* N.Y. Const. art. I, § 9 ("no . . . bookmaking, or any other kind of gambling [with certain exceptions pertaining to lotteries and horseracing] shall hereafter be authorized or allowed within this state"), and its General Obligations Law, *see* N.Y. Gen. Oblig. L. § 5-401 ("[a]ll wagers, bets or stakes, made to depend on any race, or upon any gaming by lot or chance, or upon any lot, chance, casualty, or unknown or contingent event whatever, shall be unlawful"); *see also Cohen v. Iuzzini*, 25 A.D.2d 878, 270 N.Y.S.2d 278, 279 (1966) (ruling that the predecessor statute to N.Y. Gen. Oblig. L. § 5-401 (N.Y. Penal L. § 991) did not apply to bets executed at recognized pari-mutuel tracks). Nevertheless, Cohen argues that Congress intended for the safe-harbor provision in § 1084(b) to exclude only those transmissions sent to or from jurisdictions in which betting was a crime. Cohen concludes that because the placing of bets is not a crime in New York, it is "legal" for the purposes of § 1084(b).

By its plain terms, the safe-harbor provision requires that betting be "legal," *i.e.*, permitted by law, in both jurisdictions. *See* § 1084(b); *see also* Black's Law Dictionary 902 (7th ed. 1999); Webster's 3d New Int'l Dictionary 1290 (1993). The plain meaning of a statute "should be conclusive, except in the rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242, 109 S. Ct. 1026, 103 L. Ed. 2d 290 (1989) (alteration and internal quotation marks omitted). This is not the rare case.

Although, as Cohen notes, the First Circuit has stated that

Congress "did not intend [for § 1084] to criminalize acts that neither the affected states nor Congress itself deemed criminal in nature," it did not do so in the context of a § 1084 prosecution. *See Sterling Suffolk Racecourse Ltd. P'ship v. Burrillville Racing Ass'n*, 989 F.2d 1266, 1273 (1st Cir. 1993). Instead, that case involved a private bid for an injunction under RICO (18 U.S.C. § 1961 *et seq.*) and the Interstate Horseracing Act (15 U.S.C. §§ 3001-3007) ("IHA"). *Id.* at 1272-73. It does not stand for the proposition that § 1084 permits betting that is illegal as long as it is not criminal.

In *Sterling*, the defendant was an OTB office in Rhode Island that accepted bets on horse races from distant tracks and broadcasted the races. *Id.* at 1267. The office typically obtained the various consents required under the IHA, *i.e.*, from the host track, the host racing commission, and its own racing commission. *Id.* However, it would often neglect to secure the consent of the plaintiff, a live horse-racing track located within the statutory sixty-mile radius from the OTB office. *Id.* at 1268. The plaintiff sought an injunction against the OTB office under RICO, alleging that it was engaged in a pattern of racketeering activity by violating § 1084 through its noncompliance with the IHA. *Id.*

The *Sterling* court affirmed the district court's denial of the RICO injunction. *Id.* at 1273. It noted first that because the OTB office's business was legitimate under all applicable state laws, it fell under the safe-harbor provision in § 1084(b). *Id.* Furthermore, the court held that in enacting the IHA, Congress had only created a private right of action for damages on the part of certain parties; it did not intend for any Government enforcement of the IHA. *Id.* Consequently, the plaintiff could not use the IHA together with § 1084 to transform an otherwise legal OTB business into a criminal racketeering enterprise. *Id.*

Neither *Sterling* nor the legislative history behind § 1084 demonstrates that Congress intended for § 1084(b) to mean anything other than what it says.[3] Betting is illegal in New York, and thus the safe-harbor provision in § 1084(b) cannot not apply in Cohen's case as a matter of law. As a result, the district court was not in error when it instructed the jury to disregard that provision.

*B. Transmission of a Bet, Per Se*

Cohen appeals the district court's instructions to the jury regarding what constitutes a bet *per se*. Cohen argues that under WSE's account-wagering system, the transmissions between WSE and its customers contained only information that enabled WSE itself to place bets entirely from customer accounts located in Antigua. He argues that this fact was precluded by the district court's instructions. We find no error in those instructions.

Judge Griesa repeatedly charged the jury as follows:

> If there was a telephone call or an internet transmission between New York and [WSE] in Antigua, and if a person in New York said or signaled that he or she wanted to place a specified bet, and if a person on an internet device

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[3] In support of his Congressional intent argument, Cohen offers two passages from the Congressional Reports, neither of which is persuasive. Together, the two passages evidence an intent to assist the states in enforcing gambling "offenses" and in suppressing "organized gambling activities" without preempting the states' own prosecutions of those offenses. *Compare* H.R. Rep. No. 87-967 (1961), *reprinted in* 1961 U.S.C.C.A.N 2631, 2631, *with id.* at 2633. Those passages do not demonstrate an intent to exclude illegal yet non-criminal gambling activity from the statute's purview.

> or a telephone said or signaled that the bet was accepted, this was the transmission of a bet within the meaning of Section 1084. Congress clearly did not intend to have this statute be made inapplicable because the party in a foreign gambling business deemed or construed the transmission as only starting with an employee or an internet mechanism located on the premises in the foreign country.

Jury instructions are not improper simply because they resemble the conduct alleged to have occurred in a given case; nor were they improper in this case. It was the Government's burden in this case to prove that someone in New York signaled an offer to place a particular bet and that someone at WSE signaled an acceptance of that offer. The jury concluded that the Government had carried that burden.

Most of the cases that Cohen cites in support of the proposition that WSE did not transmit any bets involved problems pertaining either to proof of the acceptance of transmitted bets, *see United States v. Truesdale*, 152 F.3d 443 (5th Cir. 1998), *McQuesten v. Steinmetz*, 73 N.H. 9, 58 A. 876 (1904), *Lescallett v. Commonwealth*, 89 Va. 878, 17 S.E. 546 (1893), or to proof of the locus of a betting business for taxation purposes, *see Saratoga Harness Racing, Inc. v. City of Saratoga Springs*, 55 A.D.2d 295, 390 N.Y.S.2d 240 (1976).

No such problems existed in this case. This case was never about taxation, and there can be no dispute regarding WSE's acceptance of customers' bet requests. For example, a March 18, 1998 conversation between Spencer Hanson, a WSE employee, and a New York-based undercover FBI agent occurred as follows:

> Agent: Can I place a bet right now?

Hanson: You can place a bet right now.

Agent: Alright, can you give me the line on the um Penn State/Georgia Tech game, it's the NIT [T]hird Round game tonight.

Hanson: Its [sic] Georgia Tech minus 7 ½, total is 147.

Agent: Georgia [T]ech minus 7 ½, umm I wanna take Georgia Tech. Can I take 'em for 50?

Hanson: Sure.

WSE could only book the bets that its customers requested and authorized it to book. By making those requests and having them accepted, WSE's customers were placing bets. So long as the customers' accounts were in good standing, WSE accepted those bets as a matter of course.

Moreover, the issue is immaterial in light of the fact that betting is illegal in New York. Section 1084(a) prohibits the transmission of information assisting in the placing of bets as well as the transmission of bets themselves. This issue, therefore, pertains only to the applicability of § 1084(b)'s safe-harbor provision. As we have noted, that safe harbor excludes not only the transmission of bets, but also the transmission of betting information to or from a jurisdiction in which betting is illegal. As a result, that provision is inapplicable here even if WSE had only ever transmitted betting information.

*III. Cohen's Mens Rea*

Cohen appeals the district court's instruction to the jury regarding the requisite *mens rea* under § 1084. Section 1084

prohibits the "knowing" transmission of bets or information assisting in the placing of bets. *See* § 1084(a). The district court instructed the jurors that to convict, they needed only to find that Cohen "knew that the deeds described in the statute as being prohibited were being done," and that a misinterpretation of the law, like ignorance of the law, was no excuse.

Cohen argues that he lacked the requisite *mens rea* because (1) he did not "knowingly" transmit bets, and (2) he did not transmit information assisting in the placing of bets or wagers to or from a jurisdiction in which he "knew" betting was illegal. He contends that in giving its jury charge, the district court improperly instructed the jury to disregard that argument.

The district court was correct; it mattered only that Cohen knowingly committed the deeds forbidden by § 1084, not that he intended to violate the statute. *See Bryan v. United States*, 524 U.S. 184, 193, 118 S. Ct. 1939, 141 L. Ed. 2d 197 (1998). Cohen's own interpretation regarding what constituted a bet was irrelevant to the issue of his *mens rea* under § 1084.

In any event, Cohen is culpable under § 1084(a) by admitting that he knowingly transmitted information assisting in the placing of bets. His beliefs regarding the legality of betting in New York are immaterial. The legality of betting in a relevant jurisdiction pertains only to § 1084(b)'s safe-harbor provision. As we have already discussed, that safe-harbor provision, as a matter of law, does not apply in this case.

*IV. Rule of Lenity*

Cohen argues that the rule of lenity, a concept grounded in due process, requires a reversal of his convictions. According to Cohen, § 1084 is too unclear to provide fair warning of what

conduct it prohibits. In particular, he contends that the statute does not provide fair warning with respect to (1) whether the phrase "bet or wager" includes account wagering, (2) whether "transmission" includes the receiving of information as well as the sending of it, and (3) whether betting must be legal or merely non-criminal in a particular jurisdiction in order to be considered "legal" in that jurisdiction. None of these contentions has any merit.

The rule of lenity applies where there exists a "grievous ambiguity" in a statute, *see Huddleston v. United States*, 415 U.S. 814, 831, 94 S. Ct. 1262, 39 L. Ed. 2d 782 (1974), such that "after seizing everything from which aid can be derived, [a court] can make no more than a guess as to what Congress intended." *Reno v. Koray*, 515 U.S. 50, 65, 115 S. Ct. 2021, 132 L. Ed. 2d 46 (1995) (internal quotation marks and citation omitted). The rule exists to prevent courts from "applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *United States v. Lanier,* 520 U.S. 259, 266-67, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997).

We need not guess whether the provisions of § 1084 apply to Cohen's conduct because it is clear that they do. First, account-wagering is wagering nonetheless; a customer requests a particular bet with WSE by telephone or internet and WSE accepts that bet. WSE's requirement that its customers maintain fully-funded accounts does not obscure that fact.

Second, Cohen established two forms of wire facilities, internet and telephone, which he marketed to the public for the express purpose of transmitting bets and betting information. Cohen subsequently received such transmissions from customers, and, in turn, sent such transmissions back to those

customers in various forms, including in the form of acceptances and confirmations. No matter what spin he puts on "transmission," his conduct violated the statute.

Third, it is clear to lawyer and layman alike that an act must be permitted by law in order for it to be legal. *See* Black's Law Dictionary 902 (7th ed. 1999); Webster's 3d New Int'l Dictionary 1290 (1993). It is also clear that betting is not permitted under New York law. *See* N.Y. Const. Art. I, § 9(1); N.Y. Gen. Oblig. L. § 5-401. Where a state's statute declares an act to be "unlawful," *see* N.Y. Gen. Oblig. L. § 5-401 ("all wagers . . . shall be unlawful"), that act is not "legal," *see* § 1084(b). The safe-harbor provision is unambiguous, and is not applicable in Cohen's case.

*V. Aiding-and-Abetting Liability*

Cohen contends that the district court constructively amended his indictment by instructing the jury on criminal aiding-and-abetting liability under 18 U.S.C. § 2(b) rather than under § 2(a) of that title. Cohen argues that as a result, the district court failed to instruct the jury that before convicting Cohen for aiding and abetting his subordinates' conduct, it must find that those subordinates were themselves guilty of crimes. Cohen also argues that he could not have been liable under § 2 for acts committed after his arrest. We find no error in either instance.

A constructive amendment can occur when jury instructions change an essential element of the charges in the indictment so as to "deprive a defendant of an opportunity to meet the prosecutor's case." *See United States v. Helmsley*, 941 F.2d 71, 90 (2d Cir. 1991). (concluding that "the indictment and the jury charge . . . comported with one another

in all essential respects, and [the defendant] had adequate notice of the conduct she was called upon to defend").

The district court indicated to the parties at the charging conference that it would only charge aiding-and-abetting liability under § 2(a). Section 2(a) requires proof that someone other than the defendant committed the underlying crime. *See United States v. Smith*, 198 F.3d 377, 383 (2d Cir. 1999).

Instead, the district court charged the jury under § 2(b), which requires only that the defendant willfully cause another person to commit an act which would have been a crime had the defendant committed it himself. *See* 18 U.S.C. § 2(b); *United States v. Concepcion*, 983 F.2d 369, 383-84 (2d Cir. 1992). Section 2(b), unlike § 2(a), does not require proof that someone else committed a crime.

Despite having charged § 2(b) rather than § 2(a), the district court did not amend Cohen's indictment. Cohen was charged in his indictment with violations of 18 U.S.C. § 2, *see* A15, and the district court gave the jury a proper instruction under that statute. Although there may have been some confusing colloquy between the district court and counsel prior to the jury charge, the charge was consistent with the indictment. There was no amendment.

Furthermore, Cohen could still have been liable for aiding and abetting the acts charged in Counts Seven and Eight of his indictment, even though those counts pertained to transmissions that occurred after his arrest. Cohen was a moving force behind WSE's entire operation, which continued to function after his arrest. Cohen retained his position as President of WSE while on bail after his arrest.

Although Cohen purportedly did not "deal with daily operations" at WSE after his arrest, he also made no effort to curtail those operations. In fact, he benefitted from them by receiving a salary, his travel expenses, and his legal fees from WSE. He clearly was still in a position to cause others, willfully, to commit acts that would have been crimes had he himself committed them. He could, therefore, have been found liable for aiding and abetting WSE's ongoing violation of § 1084.

*VI. Deposition of a Foreign Witness*

Cohen argues that the district court should have granted his motion, pursuant to Fed. R. Crim. P. 15(a), to adjourn his trial for one week so that he could depose a witness in Antigua. The witness, an Antiguan government official, was unavailable for trial due to medical reasons. That testimony, however, was not material to Cohen's trial, and thus the district court did not abuse its discretion in denying the motion.

Under Rule 15(a), a trial court may, in its discretion, order the deposition of a witness for use at trial "[w]henever due to exceptional circumstances of the case it is in the interests of justice." Fed. R. Crim. P. 15(a). A movant must show that (1) the prospective witness is unavailable for trial, (2) the witness' testimony is material, and (3) the testimony is necessary to prevent a failure of justice. *See United States v. Singleton*, 460 F.2d 1148, 1154 (2d Cir. 1972).

Cohen states that the witness' testimony was material to two issues at his trial: (1) whether Cohen had a corrupt motive; and (2) whether Cohen believed that he was transmitting mere information assisting in the placing of bets rather than any bets themselves. Cohen states that the witness would have testified

to the advice she gave him based upon her experience as an Antiguan official and upon her alleged conversations with U.S. Government officials.

As this Court has already discussed, neither of these two issues was relevant to the question of Cohen's guilt under § 1084. Cohen's purported motive was irrelevant to the issue of his conspiracy conviction, or to any other issue in his case. *See supra,* part I. His beliefs regarding the nature of WSE's transmissions were equally irrelevant in view of the fact that § 1084(b)'s safe harbor was, as a matter of law, inapplicable to him. *See supra*, part II. Therefore, the district court was well within its discretion in denying the motion.

*CONCLUSION*

For the reasons set forth above, the judgment of the district court is AFFIRMED.

## APPENDIX B

UNITED STATES COURT OF APPEALS
for the Second Circuit

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 25th day of October two thousand one.

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USA

v. Dkt No: 00-1574

Cohen

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A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant JAY COHEN.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

**FOR THE COURT**

ROSEANN B. MACKECHNIE, Clerk

By: /s/
Arthur Heller,
Administrative Attorney

## APPENDIX C

18 U.S.C.A. § 371
UNITED STATES CODE ANNOTATED
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I – CRIMES
CHAPTER 19 – CONSPIRACY

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

# 18 U.S.C.A. § 1084
# UNITED STATES CODE ANNOTATED
# TITLE 18. CRIMES AND CRIMINAL PROCEDURE
# PART I – CRIMES
# CHAPTER 50 – GAMBLING

## § 1084. Transmission of wagering information; penalties

(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both.

(b) Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State or foreign country where betting on that sporting event or contest is legal into a State or foreign country in which such betting is legal.

(c) Nothing contained in this section shall create immunity from criminal prosecution under any laws of any State.

(d) When any common carrier, subject to the jurisdiction of the Federal Communications Commission, is notified in writing by a Federal, State, or local law enforcement agency, acting within its jurisdiction, that any facility furnished by it is being used or

will be used for the purpose of transmitting or receiving gambling information in interstate or foreign commerce in violation of Federal, State or local law, it shall discontinue or refuse, the leasing, furnishing, or maintaining of such facility, after reasonable notice to the subscriber, but no damages, penalty or forfeiture, civil or criminal, shall be found against any common carrier for any act done in compliance with any notice received from a law enforcement agency. Nothing in this section shall be deemed to prejudice the right of any person affected thereby to secure an appropriate determination, as otherwise provided by law, in a Federal court or in a State or local tribunal or agency, that such facility should not be discontinued or removed, or should be restored.

(e) As used in this section, the term "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a commonwealth, territory or possession of the United States.

Supreme Court U.S.
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No. 01-1234

IN THE

# Supreme Court of the United States

JAY COHEN,

*Petitioner*,

v.

UNITED STATES,

*Respondent*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## BRIEF OF THE INTERNATIONAL FINANCIAL SECTOR REGULATORY AUTHORITY, AN ADMINISTRATIVE AGENCY OF THE GOVERNMENT OF ANTIGUA AND BARBUDA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER JAY COHEN

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TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF AUTHORITIES | ii |
| INTERSTS OF *AMICUS* | 1 |
| SUMMARY OF ARGUMENT | 2 |
| REASONS FOR GRANTING REVIEW | 2 |
| CONCLUSION | 8 |

# TABLE OF AUTHORITIES


| FEDERAL CASE | Page |
|---|---|
| *United States v. Truesdale*, 152 F.3d 443 (5th Cir. 1998) | 3 |
| **STATUTES** | |
| 18 U.S.C. § 371 | 2, 3 |
| 18 U.S.C. § 1084 | 2 |
| 18 U.S.C. § 1955 | 3 |
| 18 U.S.C. § 1956(a)(1)(A)(i) | 3 |
| 18 U.S.C. § 1956(a)(1)(B)(i) | 3 |
| Antigua and Barbuda, International Business Corporation Act, §281(2)(b) | 5 |
| **REGULATIONS** | |
| S. Ct. R. 37.6 | 1 |
| Antigua and Barbuda, Interactive Gaming and Interactive Wagering Regulations, 2001 No. 16 | 6 |
| **OTHER MATERIALS** | |
| Antigua and Barbuda Free Trade and Processing Zone, Strategic Plan, 2001-2005 (March 2001) | 5 |
| Batt, "Antigua Leading Way in Regulating Internet Gambling," lasvegas.com Gaming Wire (April 30, 2001) | 6 |
| New Jersey Assembly Commerce, Tourism Gaming and Military and Veterans' Affairs Committee Hearing (May 31, 2000) | 7, 8 |
| Report to Prime Minister Lester Bird on Meeting with Mr. Scott Charney and Mr. Jonathan Winer, 21st and 22nd in Washington, D.C. (September 30, 1997) | 4 |

TABLE OF AUTHORITIES—Continued

Page

United States Treasury Department, FinCen Advisory (August 2001) ..... 7

Wexler and Eisenberg, "Blowing Whistle on Campus Gambling," *Chronicle of Higher Education* (February 22, 2002) ..... 6

IN THE

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No. 01-1234

JAY COHEN,

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## BRIEF OF THE INTERNATIONAL FINANCIAL SECTOR REGULATORY AUTHORITY, AN ADMINISTRATIVE AGENCY OF THE GOVERNMENT OF ANTIGUA AND BARBUDA AS *AMICUS CURIAE* IN SUPPORT OF JAY COHEN

The International Financial Sector Regulatory Authority ("IFSRA"), an Administrative Agency of the Government of Antigua and Barbuda ("Antigua"), with the consents of the parties, submits this brief *amicus curiae* in support of Jay Cohen, Petitioner in the above-captioned proceedings.

## INTERESTS OF *AMICUS* [1]

This case presents issues of critical concern to Antigua. Antigua's economy relies heavily on the economic benefit

[1] Pursuant to S. Ct. R. 37.6, no counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus*, its members and its counsel, contributed monetarily to the preparation or submission of this brief.

that interactive wagering provides. If Antigua is unable to permit interactive wagering subject to strong and comprehensive regulatory controls, the negative impact on the Antiguan economy will be substantial.

## SUMMARY OF ARGUMENT

The Court should grant certiorari in this case to address the expansive interpretation of 18 U.S.C. § 371, the federal conspiracy statute, and 18 U.S.C. § 1084 (the "Wire Act") by the United States Court of Appeals for the Second Circuit. The Second Circuit's decision would criminalize not only the activities of American citizens in Antigua, but also activities of non-American citizens engaged in the betting or wagering business from Antigua, suppliers for that business, and even Antiguan governmental officials not protected by the doctrine of Sovereign Immunity.

Should the petition for certiorari not be granted and the present decision be allowed to stand, it would have a very negative impact on the Antiguan economy and hamper the country's efforts to create strong regulatory controls over all interactive wagering.

## REASONS FOR GRANTING REVIEW

*Amicus curiae* IFSRA, Antigua's Internet gaming regulatory agency, adopts Petitioner's Statement of the Case. IFSRA shares Petitioner's concern about the decision of the district court which "deemed irrelevant the testimony of Gyneth McAllister, a government official in charge of Antigua's gaming regulations, who was prepared to testify about the steps taken to set up WSE [World Sports Exchange], Antiguan law in relation to WSE, and her interactions with U.S. officials concerning gaming regulation and with Mr. Cohen himself. A.282-85." Petition for Writ of Certiorari, at 7, n.3.

## I.

If the decision under appeal is allowed to stand, the parameters of the federal conspiracy statute and the Wire Act would be uncertain. Would criminal sanctions apply to non-U.S. citizens accepting offshore wagers from within the United States? Would sanctions apply to suppliers of the offshore operators? Would sanctions apply to Antiguan regulators?

It is undisputed that Internet gambling is legal in and regulated by the laws of Antigua. United States courts have reached conflicting conclusions on the efforts of prosecutors against offshore licensed operators. For example, in *United States v. Truesdale*, 152 F.3d 443 (5th Cir. 1998), the defendants faced a twenty-two count indictment, including charges of conspiracy in violation of 18 U.S.C. §371; illegal gambling, in violation of 18 U.S.C. §1955; and money laundering, in violation of 18 U.S.C. §1956(a)(1)(A)(i) and (a)(1)(B)(i). Defendants had established offshore operations in the Caribbean, but paid winners from Texas. The Court of Appeals reversed the illegal gambling, conspiracy and money laundering convictions because "those convictions all depended on a finding that the appellants engaged in illegal gambling activity." *Id.* at 446. The appellate court concluded that there was no violation of Texas gambling law because defendants had not been charged under the correct statute--possession of bookmaking paraphernalia.

In dicta, the Court stated:

> Perhaps in some circumstances, evidence of callers attempting to place bets, the mere capability to input illegal bookmaking information into the offshore computer, and the other circumstantial evidence might lead to a rational inference that appellants were engaged in illegal bookmaking in Texas. However, looking at the overall circumstances of this case, such an inference is unwarranted. Jones and his co-appellants went to great effort to make sure that their operation was legal. They

> set up offshore offices and consulted with lawyers in the United States and abroad on the legality of their enterprise; they furnished the Caribbean local offices with desks and telephones and staffed them with personnel to accept international phone wagers; they set up separate phone lines that could be used to place bets in the offshore offices. Under these circumstances, without specific evidence of any wrongdoing, it is irrational to conclude beyond a reasonable doubt that after having gone through the effort of fully equipping, staffing and widely advertising the Caribbean offices, the appellants nevertheless illegally accepted bets in the United States.

*Id.* at 448.

There was no allegation of a violation of the Wire Act in *Truesdale*. But the decision persuasively demonstrates why Antiguan law and the precautions he took should protect Cohen from prosecution. This is especially true in the light of the fact that the United States has worked with the Antiguan government to develop its offshore gaming procedures.

Antigua has comprehensively regulated Internet gambling, which is an essential part of its economic plan. In developing the country's regulatory framework for gaming, Antiguan regulators even met with United States officials to obtain their assistance in establishing a system to better protect the interactive player. (Government of Antigua and Barbuda, "Recommendations on How We Can Better Regulate the Industry to Protect the Player," Report to Prime Minister Lester Bird on Meeting with Mr. Scott Charney and Mr. Jonathan Winer, 21st and 22nd in Washington, D.C., September 30, 1997).

In the present case, Mr. Cohen's lawyers were not permitted a short continuance to take the deposition in Antigua of Gyneth McAllister, the Antiguan official who was the director of offshore gaming and who was too ill to attend the trial. She would have testified, *inter alia*, about her

meeting with Scott Charney, White House Advisor on Computer Fraud and Head of the Computer Fraud Division of the United States Department of Justice, and Jonathan Winer, Deputy Secretary of State, and how the United States government expressed interest in assisting Antigua's development of interactive procedures for player protection.

## II.

Antigua is a developing nation of approximately 70,000 residents which relies heavily on tourism and foreign investment. In order to encourage foreign investment, Antigua has set up a Free Trade and Processing Zone to develop and attract industries related to information technology. In fact, "the license fees received from sports book and Internet gaming represent the main source of revenues to the Free Trade Zone," and Internet gaming operators employ about 700 residents. (Antigua and Barbuda Free Trade and Processing Zone, Strategic Plan 2001-2005, at 1-2 (March 2001)).

Many other countries have licensed offshore gambling and wagering. Unlike most, Antigua opted for a strong regulatory approach based on the systems of Great Britain and New Jersey. On May 17, 2001, Antigua amended Section 281(2)(b) of the International Business Corporation Act (which regulates all offshore corporations) to provide that "internet gaming, sports books and virtual casinos from Antigua and Barbuda shall be charged at the rate of three (3%) per centum of the gross handle."

More importantly, on May 22, 2001, the Antiguan government promulgated "Regulations Concerning Interactive Gaming and Interactive Wagering." Those regulations were the result of various meetings of Financial Action Task Force and Anti-Money-Laundering officials and experts, offshore operators, gaming experts and government officials. According to one report in the media, "The scheme broadens

Antigua's monitoring authority of Internet gambling operators and demands more personal disclosures from applicants seeking licenses. But money laundering was the primary focus." (Tony Batt, "Antigua Leading Way in Regulating Internet Gambling," *lasvegas.com* Gaming Wire (April 30, 2001)).

The new regulations created mandatory procedures to verify the age of all potential players (Part VIII), imposed a duty to report dishonest/unlawful acts and suspicious activities (Part XVI), and require exhaustive disclosures for those who wish to obtain (Schedule A) or renew a gaming license (Schedule D). Their basic purpose was to ensure the suitability of all applicants for a gaming or wagering license, the financial solvency of all gaming operations, and the protection of players. Applicants who are unable to establish their suitability or solvency would be denied a license.

IFSRA is the Antiguan agency which has the delegated authority to regulate all offshore corporations pursuant to the International Business Corporations Act. Within this statutory authority, the Directorate of Offshore Gaming is the department that has been assigned the specific regulatory duties. The mission of these authorities is not to promote offshore gaming, but to supervise and regulate it.

The new regulatory scheme includes provisions which are designed to minimize acceptance of "suspicious" bets by licensed operators, enhance player protection, and provide for random inspection of all gaming devices. The regulations also contain safeguards to minimize the possibility of bets by minors.

The protection of minors is very important to Antiguan regulatory authorities, and they have made every attempt in their rules to curb underage betting. In a February 22, 2002 *Chronicle of Higher Education* article, "Blowing the Whistle on Campus Gambling," Arnie Wexler and Marc Isenberg observed that "it may be hard for a student under 21 to buy a

pack of cigarettes or a can of beer, but within 15 minutes he or she can find a student bookie and place a bet." The authors were also critical of the availability of offshore betting opportunities on campus. Again, the Antiguan regulatory structure would make underage betting with any Antiguan licensee extremely difficult.

Almost immediately after Antigua promulgated its strong regime of Internet gaming regulations, Great Britain, in July 2001, lifted its financial advisory on Antiguan banks, which had been in effect since April 1999. ("U.K. Lifts Financial Advisory on Antigua," http://www.Antigua-barbuda.com/news, July 2001). The following month, the United States Department of the Treasury Financial Crimes Enforcement Network withdrew its Advisory 11, a warning regarding Antigua, because Antigua "has enacted significant reforms to its counter-money laundering system, addressing the points noted in Advisory 11, and has taken concrete steps to bring these reforms into effect." (U.S. Treasury Department, FinCen Advisory, Aug. 2001).

Even one of the harshest critics of Internet gambling paid Antigua a backhanded compliment. Testifying on May 31, 2000 before the New Jersey Assembly of Commerce, Tourism, Gaming and Military and Veterans' Affairs Committee on the feasibility of authorizing and regulating Internet gambling in New Jersey, J.P. Suarez, Director of the New Jersey Division of Gaming Enforcement, who later instituted a civil action against 11 offshore operators, confirmed that Antigua had assumed the costs and burdens associated with the strict regulation of gaming:

> In Antigua recently, the minister of their gaming division [Gyneth McAllister] proposed regulations that would do just that. She proposed regulations that would essentially put a device—software, I believe it was—on the computer gamines that would allow her regulators to monitor what's going on in the Antiguan casinos. Well,

> the collective howl of Antiguan operators could be heard across the Caribbean. They're fleeing Antigua and going to a more charitable location that won't require that kind of regulatory oversight.

The outcome of this case will have a substantial impact on Antigua's continuing efforts to develop the kind of regulatory oversight needed to guarantee the integrity of Internet gaming there, which will in turn provide durable benefits to the Antiguan economy.

## CONCLUSION

For all of the foregoing reasons, the IFSRA urges that the Court grant the petition for certiorari in this case to address the issues significantly affecting Internet gaming.

Respectfully submitted,

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No. 01-1234

# In the Supreme Court of the United States

JAY COHEN, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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25 pg

## QUESTIONS PRESENTED

1. Whether the district court erred in declining to instruct the jury that, in order to find petitioner guilty of conspiring to violate the Wire Wager Act, 18 U.S.C. 1084(a), it must find that he acted with a "corrupt motive."

2. Whether the bookmaking activities for which petitioner was convicted were lawful under the "safe harbor" provision of 18 U.S.C. 1084(b).

3. Whether the district court erred in declining to instruct the jury that, in order to find petitioner guilty of a substantive offense under Section 1084(a), it must find that he knew his activities were in violation of federal law.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinion below | 1 |
| Jurisdiction | 1 |
| Statement | 2 |
| Argument | 5 |
| Conclusion | 19 |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *Bryan* v. *United States*, 524 U.S. 184 (1998) | 17, 18 |
| *Cheek* v. *United States*, 498 U.S. 192 (1991) | 17 |
| *Cohen* v. *United States*, 378 F.2d 751 (9th Cir.), cert. denied, 389 U.S. 897 (1967) | 17 |
| *Cruz* v. *United States*, 106 F.2d 828 (10th Cir. 1939) | 8 |
| *Fall* v. *United States*, 209 F. 547 (8th Cir. 1913) | 8-9 |
| *Hamburg-American Steam Packet Co.* v. *United States*, 250 F. 747 (2d Cir.), cert. denied, 246 U.S. 662 (1918) | 6 |
| *Keegan* v. *United States*, 325 U.S. 478 (1945) | 6, 9 |
| *Landen* v. *United States*, 299 F. 75 (6th Cir. 1924) | 8 |
| *Lescallett* v. *Commonwealth*, 17 S.E. 546 (Va. 1893) | 14 |
| *Liparota* v. *United States*, 471 U.S. 419 (1985) | 18 |
| *McQuesten* v. *Steinmetz*, 58 A. 876 (N.H. 1904) | 14 |
| *Morrissette* v. *United States*, 342 U.S. 246 (1952) | 18 |
| *People* v. *Powell*, 63 N.Y. 88 (1875) | 4, 5-6 |
| *People ex rel. Vacco* v. *World Interactive Gaming Corp.*, 714 N.Y.S.2d 844 (Sup. Ct. 1999) | 12 |
| *Sagansky* v. *United States*, 358 F.2d 195 (1st Cir.), cert. denied, 385 U.S. 816 (1966) | 13 |
| *Saratoga Harness Racing, Inc.* v. *City of Saratoga Springs*, 55 A.D.2d 295 (N.Y. 1976) | 14 |
| *Sterling Suffolk Racecourse Ltd. P'ship* v. *Burrillville Racing Ass'n*, 989 F.2d 1266 (1st Cir.), cert. denied, 510 U.S. 1024 (1993) | 10-11 |

Cases—Continued: Page

*United States* v. *Barker*, 514 F.2d 208 (D.C. Cir.), cert. denied, 421 U.S. 1013 (1975) ..... 8
*United States* v. *Blair*, 54 F.3d 639 (10th Cir.), cert. denied, 516 U.S. 883 (1995) ..... 7, 9, 17
*United States* v. *Feola*, 420 U.S. 671 (1975) ..... 4, 6, 7
*United States* v. *Leon*, 534 F.2d 667 (6th Cir. 1976) ..... 7, 9
*United States* v. *Mack*, 112 F.2d 290 (2d Cir. 1940) ..... 6
*United States* v. *Mendelsohn*, 896 F.2d 1183 (9th Cir. 1990) ..... 18
*United States* v. *Murray*, 928 F.2d 1242 (1st Cir. 1991) ..... 7, 8
*United States* v. *Previte*, 648 F.2d 73 (1st Cir. 1981) ..... 8
*United States* v. *Ross*, No. 98-CR.1174-1 (KMV), 1999 WL 782749 (S.D.N.Y. Sept. 16, 1999) ..... 13
*United States* v. *Tomeo*, 459 F.2d 445 (10th Cir.), cert. denied, 409 U.S. 914 (1972) ..... 13
*United States* v. *Thomas*, 887 F.2d 1341 (9th Cir. 1989) ..... 7
*United States* v. *Truesdale*, 152 F.3d 443 (5th Cir. 1998) ..... 14

Constitution and statutes:

N.Y. Const. ..... 4
Interstate Horseracing Act of 1978, 15 U.S.C. 3001-3007 ..... 11
15 U.S.C. 3002(3) ..... 15
Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 *et seq.* ..... 11
Wire Wager Act:
18 U.S.C. 1084 ..... 4, 10, 15
18 U.S.C. 1084(a) ..... 2, 3, 5, 11, 15, 16, 17, 18
18 U.S.C. 1084(b) ..... 3, 4, 5, 9, 11, 12, 13, 14, 16
7 U.S.C. 2024(b)(1) ..... 18
18 U.S.C. 111 ..... 7
18 U.S.C. 371 ..... 2, 6
18 U.S.C. 1953 ..... 18

Statutes—Continued: Page

18 U.S.C. 1955 ..... 8
N.Y. Penal Law (McKinney 2000):
§ 225.00(3) ..... 12
§ 225.00(4) ..... 12
§ 225.00(5) ..... 12
§ 225.05 ..... 12
§ 225.10 ..... 12

Miscellaneous:

*Black's Law Dictionary* (7th ed. 1999) ..... 10
Edward J. Devitt, *Federal Jury Practice and Instructions* (4th ed. 1990) ..... 8
H.R. Rep. No. 967, 87th Cong., 1st Sess. (1961) ..... 10
2 Model Penal Code and Commentaries (1985) ..... 8
*Statement by President William J. Clinton Upon Signing H.R. 4942*, 36 Weekly Comp. Pres. Doc. 3153 (Dec. 21, 2000) ..... 15
*Webster's Third International Dictionary* (1993) ..... 10

# In the Supreme Court of the United States

No. 01-1234

JAY COHEN, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 260 F.3d 68.

### JURISDICTION

The judgment of the court of appeals was entered on July 31, 2001. The petition for rehearing was denied on October 25, 2001 (Pet. App. 19a). On January 11, 2002, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including February 22, 2002, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on one count of conspiring to violate the Wire Wager Act, 18 U.S.C. 1084(a), in violation of 18 U.S.C. 371, and on seven counts charging substantive violations of the Act. He was sentenced to 21 months' imprisonment. The court of appeals affirmed. Pet. App. 1a-18a.

1. The evidence at trial showed that petitioner was president of World Sports Exchange (WSE), a sports wagering business located on the island of Antigua in the Caribbean. WSE targeted customers in the United States and promoted its business throughout the country by radio, newspaper, and television. Its advertisements invited customers to bet on American sporting events by toll-free telephone calls or over the Internet. Pet. App. 1a-2a.

WSE required new customers to open an account with the company and to wire $300 to that account in Antigua. A customer wishing to place a bet would do so by contacting WSE by telephone or the Internet. WSE would issue an immediate, automatic acceptance and confirmation of the bet, using funds from the customer's account to cover the bet. WSE would customarily retain a commission of 10% on each bet. Pet. App. 2a.

By November 1998, WSE had received 60,000 phone calls from customers in the United States, including 6100 from New York. In one 15-month period, the business collected approximately $5.3 million in funds wired by its customers in the United States. Pet. App. 2a.

2. Section 1084(a) makes it unlawful "knowingly" to transmit in interstate and foreign commerce (1) "bets or

wagers" on sporting events; (2) "information assisting in the placing" of any such bets or wagers; or (3) a communication "which entitles the recipient to receive money or credit as a result of bets or wagers." The statute contains a "safe harbor" provision, 18 U.S.C. 1084(b), which exempts from its coverage transmissions of "information" (but not of bets or of "communications" of the type prohibited by the third clause of subsection (a)) between States or countries where betting on the particular sporting event at issue is "legal." The conspiracy count in this case charged a conspiracy to violate all three clauses of Section 1084(a). Five of the substantive counts charged petitioner with substantive violations of all three clauses of Section 1084(a), and the jury, by special interrogatory, found petitioner guilty of violating all three clauses charged in those counts. The other two substantive counts charged only the transmission of "information."

At trial, petitioner's defense was that he acted in the belief that his conduct was lawful because it took place entirely in Antigua. He claimed that the placing of telephonic and Internet bets from the United States did not constitute the transmission of bets but rather directions to place bets. Petitioner argued that the transmission of such directions between jurisdictions in which sports betting is legal falls within the statute's "safe harbor" provision. Petitioner testified that, although he did not know whether placing bets on sporting events was legal in other States, he believed it was legal in New York. Gov't C.A. Br. 14.

With respect to the *mens rea* element of a Section 1084(a) offense, the district court instructed the jury that the government must prove only that petitioner "knew that the deeds described in the statute as being prohibited were being done," and that it did not have to

show that petitioner "knew that he was acting illegally under the statute." Pet. App. 13a; Gov't C.A. Br. 31. The court further explained that "ignorance of the law is no excuse." *Ibid.* The court instructed the jury to disregard the "safe harbor" provision of Section 1084(b), having found that it is inapplicable in this case. Pet. App. 7a.

3. On appeal, petitioner contended that the district court erred in instructing the jury that his good-faith belief in the legality of his conduct was not a valid defense to the conspiracy charge. He relied on *People* v. *Powell*, 63 N.Y. 88 (1875), which held that corrupt motive is an element of any conspiracy to commit an offense that is *malum prohibitum* rather than *malum in se*. The court of appeals observed that the so-called *Powell* doctrine was "echoed" in federal cases during the first half of the last century, but that the courts have since "moved away" from it. Pet. App. 5a. The court further noted that the American Law Institute's Model Penal Code had rejected the doctrine, and that, in *United States* v. *Feola*, 420 U.S. 671 (1975), this Court had held in another context that the federal conspiracy statute did not require proof of *scienter*. Pet. App. 6a-7a. The court concluded that "the *Powell* doctrine does not apply to a conspiracy to violate 18 U.S.C. § 1084." *Id.* at 7a.

Petitioner also challenged the district court's conclusion that the "safe harbor" provision is inapplicable in this case. He argued that betting on sports events is legal in both Antigua and New York, and that WSE's transmissions involved information assisting in the placing of bets rather than bets themselves. The court of appeals rejected both arguments. Pet. App. 8a-12a.

First, the court, citing to provisions prohibiting betting in the Constitution of New York State and in the

State's General Obligations Law, stated that "[t]here can be no dispute that betting is illegal in New York." Pet. App. 8a. The court was not persuaded by the argument that betting is "legal" in New York for purposes of Section 1084(b) because the State does not make it a crime. The court explained that, "[b]y its plain terms," the word "legal" means "permitted by law," and that betting is barred by law in New York regardless of whether it is punished criminally. *Ibid.* With respect to petitioner's argument that the transmissions did not involve bets but directions to place bets, the court of appeals explained that "[b]y making * * * requests and having them accepted, WSE's customers were placing bets." *Id.* at 12a. The court noted, however, that in light of its holding that betting is illegal in New York, the issue of whether the transmissions were of the type that are covered by the "safe harbor" provision was "immaterial." *Ibid.*

Finally, petitioner contended that the word "knowingly" in Section 1084(a) requires knowledge that one's conduct violates the statute, and therefore that the district court erred in instructing the jury that such knowledge is not an element of the offense. The court of appeals held that "[t]he district court was correct; it mattered only that [petitioner] knowingly committed the deeds forbidden by § 1084, not that he intended to violate the statute." Pet. App. 13a.

**ARGUMENT**

1. Petitioner renews his contention (Pet. 11-18) that the district court should have instructed the jury that, in order to convict him of conspiring to violate 18 U.S.C. 1084(a), it had to find that he had a "corrupt motive" in the sense that he had knowledge of the illegality of the underlying conduct. Relying on *People* v. *Powell*, 63

N.Y. 88, 92 (1875), and its progeny, he argues that when the object of the conspiracy is not clearly wrongful in itself but rather is wrongful solely by reason of a statutory prohibition, the government must prove not only an agreement to achieve that object but also a "corrupt motive." Even accepting *arguendo* petitioner's assumption that bookmaking is not wrongful in itself, the court of appeals correctly rejected petitioner's claim.

Petitioner's contention that the government must prove that the defendant had a "corrupt motive" in order to convict him for conspiracy is at odds with the language of the federal conspiracy statute, 18 U.S.C. 371. That statute makes it a crime to "conspire * * * to commit any offense against the United States." The statute says nothing about a "corrupt motive," nor does it otherwise contain any *mens rea* element separate from that required to commit the underlying offense itself. There is no sound reason why a "corrupt motive" should be an element of conspiracy where Congress has chosen not to make it an element of the underlying offense. See *United States* v. *Mack*, 112 F.2d 290, 292 (2d Cir. 1940) (L. Hand, J.) ("[I]t is hard to see any reason for [the *Powell* doctrine]").[1]

In *United States* v. *Feola*, 420 U.S. 671 (1975), the defendant was convicted of a Section 371 conspiracy to

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[1] Petitioner argues (Pet. 14-15) that a "corrupt motive" requirement should be read into the conspiracy statute because at the time Congress reenacted it in 1948 the *Powell* doctrine was settled law. That is not so. This Court has never endorsed the doctrine, and in *Keegan* v. *United States*, 325 U.S. 478 (1945), four Justices went on record as disapproving it. *Id.* at 506 (Stone, J., dissenting). Nor had every court of appeals endorsed the doctrine. See, *e.g.*, *Hamburg-American Steam Packet Co.* v. *United States*, 250 F. 747, 759 (2d Cir.), cert. denied, 246 U.S. 662 (1918); *United States* v. *Mack*, 112 F.2d at 292.

assault a federal officer while the officer was engaged in the performance of his official duties. The underlying substantive offense, 18 U.S.C. 111, did not require knowledge that the intended victim was a federal officer. The issue before the Court was whether the government was nonetheless required to prove such knowledge under the conspiracy statute. The Court held that it was not, concluding that "where a substantive offense embodies only a requirement of *mens rea* as to each of its elements, the general federal conspiracy statute requires no more." 420 U.S. at 692. The Court relied for that conclusion chiefly on the language of the conspiracy statute itself, observing that "nothing on the face" of that statute would require greater knowledge on the part of those conspiring to commit an offense than is required to actually commit the offense. *Id.* at 687. The Court in *Feola* did not have occasion specifically to consider the question of whether the government must prove a "corrupt motive" where the underlying conduct is not wrongful in itself. See 420 U.S. at 691. Nevertheless, such a requirement is inconsistent with the statutory analysis in *Feola* and with its holding that a conspiracy offense requires the same *mens rea* as required to commit the underlying offense.

Since *Feola*, the courts of appeals, in reliance on that decision, have repeatedly rejected claims that a "corrupt motive" or knowledge of the law is an element of a gambling conspiracy. See *United States* v. *Blair*, 54 F.3d 639, 642-643 (10th Cir.) (conspiracy to violate Section 1084(a)), cert. denied, 516 U.S. 883 (1995); *United States* v. *Murray*, 928 F.2d 1242, 1251 (1st Cir. 1991); *United States* v. *Leon*, 534 F.2d 667, 674-675 (6th Cir. 1976); see also *United States* v. *Thomas*, 887 F.2d 1341, 1346-1347 (9th Cir. 1989) (holding that knowledge of the law is not an element of a conspiracy to engage in

"apparently innocent conduct"). No federal court of appeals has cited the *Powell* doctrine with approval since *Feola*. Nor do the standard jury instructions on conspiracy include an element of "corrupt motive." See, *e.g.*, Edward J. Devitt, *Federal Jury Practice and Instructions* § 28.03 (4th ed. 1990). And, as the court of appeals noted (Pet. App. 6a-7a), the American Law Institute rejected the *Powell* doctrine in its Model Penal Code. See 2 Model Penal Code and Commentaries, pt. 1, § 5.03 note on subsec. 1 & cmt. 2(c)(iii) (1985).

The only post-*Feola* circuit court decision petitioner cites (Pet. 12) is *United States* v. *Previte*, 648 F.2d 73 (1st Cir. 1981).[2] In that case the court stated that the defendant had invoked the *Powell* doctrine but that the doctrine was inapplicable on its own terms because the underlying substantive statute required "guilty knowledge." *Id.* at 81-82. Accordingly, the court, which took note of Judge Hand's criticism of the doctrine, did not have occasion to decide whether the doctrine was viable as a general rule of conspiracy law. Previously, in *United States* v. *Murray*, *supra*, the same court held that knowledge of the law is not an element of conspiracy to conduct a gambling business in violation of 18 U.S.C. 1955.[3]

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[2] Chief Judge Bazelon's concurring opinion in *United States* v. *Barker*, 514 F.2d 208 (D.C. Cir.) (en banc), cert. denied, 421 U.S. 1013 (1975), the only other modern circuit court authority cited by petitioner (Pet. 12), was issued several days before the decision in *Feola*. In any event, that opinion did not refer to *Powell* as the law of the D.C. Circuit or any other court, and it noted that the doctrine had been criticized. 514 F.2d at 234 n.34.

[3] In his support, petitioner cites (Pet. 11-12) three court of appeals decisions from the early part of last century: *Cruz* v. *United States*, 106 F.2d 828 (10th Cir. 1939); *Landen* v. *United States*, 299 F. 75 (6th Cir. 1924); and *Fall* v. *United States*, 209 F. 547, 553 (8th

Nor is petitioner's cause aided by *Keegan* v. *United States*, 325 U.S. 478 (1945), which he also cites (Pet. 16-17). In *Keegan*, the defendants were convicted of conspiring to counsel evasion of the Secret Service Act by urging individuals to protest the draft and challenge its legality. A fragmented Court reversed the convictions not on the basis of the *Powell* doctrine, which the plurality and concurring opinions did not address, but because the defendants' agreement did not violate the underlying substantive statute. 325 U.S. at 495 (plurality opinion); *id.* at 495-498 (Black, J., concurring); *id.* at 498 (Rutledge, J., concurring). The only Justices to address the *Powell* doctrine were the four dissenters, who rejected it. *Id.* at 506 (Stone, C.J., dissenting) ("The doctrine of *People* v. *Powell* * * * has never been accepted by this Court.").

2. Petitioner contends (Pet. 18-22, 26-29) that the courts below erred in concluding that Section 1084(b)'s "safe harbor" provision is inapplicable in this case. That provision exempts from the statute's coverage transmissions limited to mere information that assists in the placing of bets (as opposed to transmissions of bets themselves), where "such betting" is "legal" both in the place of origin and the destination of the transmission. Petitioner argues that his activities satisfied both

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Cir. 1913). Significantly, in post-*Feola* cases, the Sixth and Tenth Circuits have held that knowledge of the law is not an element of a gambling conspiracy. See *United States* v. *Leon*, *supra*, and *United States* v. *Blair*, *supra*. And, contrary to petitioner, *Fall* does not stand for the proposition that knowledge of the law is an element of conspiracy when the underlying conduct is not wrongful in itself; it stands for the proposition that, under the circumstances of that case, evidence of official misinformation as to the requirements of the law was admissible to negate fraudulent intent. 209 F. at 553.

elements of Section 1084(b)—that is, that betting is "legal" in New York State, the origin of the transmissions at issue here,[4] and that the transmissions did not involve bets but rather were limited to information assisting in the placing of bets.

a. Petitioner does not dispute that both the New York State Constitution and the State's General Obligation Law expressly prohibit betting. Rather, he argues (Pet. 18-22) that the word "legal" in the statute means "not criminal," and that no penal statute in New York State criminalizes the placing of a bet. That argument, however, is contrary to the ordinary understanding of the word "legal," which is "permitted by law." See *Webster's Third International Dictionary* 1290 (1993); *Black's Law Dictionary* 902 (7th ed. 1999). Moreover, the legislative history of Section 1084 confirms that Congress regarded New York as a State where betting is not "legal" within the meaning of the "safe harbor" provision. The House Report states that, although in Nevada it is "lawful to make and accept bets on [a horse] race held in * * * New York," it is "unlawful to make and accept bets in New York State on a [horse] race being run in Nevada." Accordingly, the Report continued, "the transmission of information assisting in the placing of bets and wagers from Nevada to New York would be contrary to the provisions of the bill." H.R. Rep. No. 967, 87th Cong., 1st Sess. 3 (1961).

Petitioner's reliance (Pet. 19-20) on *Sterling Suffolk Racecourse Ltd. Partnership* v. *Burrillville Racing Ass'n*, 989 F.2d 1266 (1st Cir.), cert. denied, 510 U.S.

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[4] It is undisputed that betting is legal in Antigua, the place of origin of the transmissions.

1024 (1993), is misplaced.[5] In that case, the defendant was an off-track betting facility in Rhode Island that accepted bets on horse races from distant tracks and broadcasted the races. The defendant would often neglect to secure the consent of the plaintiff, a Massachusetts track, as required by the Interstate Horseracing Act of 1978 (IHA), 15 U.S.C. 3001-3007. The plaintiff sought an injunction against the off-track betting facility under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, alleging that the facility was engaged in a pattern of racketeering activity by violating Section 1084(a) through its noncompliance with the IHA. The court of appeals denied the RICO injunction. In so doing, it noted that because the off-track betting facility's business was legal under the laws of all interested States, it fell under the "safe harbor" provision of Section 1084(b). 989 F.2d at 1273. The court further noted that, in enacting the IHA, Congress had only created a private cause of action for damages on the part of certain parties and did not intend that there be government enforcement. Consequently, the court concluded that the plaintiff could not use the IHA to avoid the applicability of the "safe harbor" provision—that is, "to transform an otherwise legal OTB business into a criminal racketeering enterprise." Pet. App. 9a. The court was not confronted with and did not consider the question whether, for purposes of Section 1084(b), placing a bet is "legal" in a State that specifically prohibits it by statute but does not attach criminal penalties to the prohibition. As the court below observed, "*Sterling* [does not] * * * demonstrate[] that Congress intended

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[5] None of the other cases relied on by petitioner (Pet. 20-21) involves Section 1084(b) nor the meaning of the word "legal."

for § 1084(b) to mean anything other than what it says." *Id.* at 10a.[6]

b. Nor can petitioner satisfy the second element of the Section 1084(b) exemption—that, under WSE's account-wagering system, the transmissions from WSE's customers in New York involved only instructions to place bets rather than bets themselves. In each telephone conversation at issue the bettor asked if he could place a bet, a WSE operator confirmed that he could, and the bettor then specified the amount and

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[6] In any event, the safe harbor would not apply in this case because, while it is true that the placing of a bet is not a crime in New York State, the process of "betting" through a bookmaker is a crime. It is a misdemeanor to "knowingly advance[] or profit[] from unlawful gambling activity," such as betting on sports that is not specifically authorized by law, N.Y. Penal Law § 225.05 (McKinney 2000), and it is a felony to do so and "receive[] or accept[] in any one day more than five bets totaling more than five thousand dollars," *id.* § 225.10. An individual "'advances gambling activity' when, acting other than as a player, he engages in conduct which materially aids any form of gambling activity," *id.* § 225.00(4), and an individual "'profits from gambling activity' when, other than as a player, he accepts or receives money * * * pursuant to an agreement or understanding * * * whereby he participates or is to participate in the proceeds of gambling activity," *id.* § 225.00(5). The cited criminal prohibitions apply only to someone who is not a "player," defined as a "contestant or bettor" who receives no profit other than "personal gambling winnings" and does not "render[] any material assistance to the establishment, conduct, or operation of the particular gambling activity." *Id.* § 225.00(3). See generally *People ex rel. Vacco* v. *World Interactive Gaming Corp.*, 714 N.Y.S.2d 844, 851 (Sup. Ct. 1999) (relying on above statutes). In other words, according to New York law, the placing of a bet with a party who is to earn a profit—a bookmaker—necessarily gives rise to a crime, in which the bookmaker, but perhaps not the bettor, is the criminally liable party.

terms of the bet, which the operator accepted and confirmed on the spot. The bets placed over the Internet were fully consummated upon the bettor's click of a button labeled "place wager" and the bettor's receipt of an automatic, immediate confirmation. As the court of appeals correctly concluded, under that procedure, "WSE's customers were placing bets." Pet. App. 12a; see *United States* v. *Tomeo*, 459 F.2d 445, 446 (10th Cir.) ("When a person holds himself out as being willing to make bets or wagers over interstate telephone facilities, and does in fact accept offers of bets or wagers over the telephone as part of his business, we think it is consistent with both the language and the purpose of [Section 1084(a)] to hold that he has 'used' the facility for the transmission of bets or wagers.") (quoting *Sagansky* v. *United States*, 358 F.2d 195 (1st Cir.), cert. denied, 385 U.S. 816 (1966)), cert. denied, 409 U.S. 914 (1972).

The distinction between bets and "information" potentially exempt under Section 1084(b) was correctly described by the district court in *United States* v. *Ross*, No. 98 CR 1174-1 (KMV), 1999 WL 782749, *5 (S.D.N.Y. Sept. 16, 1999):

> [The distinction is] between transmissions constituting an individual gambling transaction—those necessary to effect a particular "bet or wager"—and transmission of "information" that merely "assists" a potential bettor or bookmaker. Such "information" would include knowledge that may influence whether, with whom, and on what terms to make a bet. Thus transmissions reporting the results of sporting events, the odds placed on particular contests by odds-makers, or the identities of persons

seeking to place bets would be examples of "information."

Petitioner draws a distinction (Pet. 27-28 & n.14) between the "account wagering" system employed by WSE and what could be called "credit wagering," claiming that the former is protected by Section 1084(b). But under both systems the bettor transfers no money, only a request to place a bet. And under the "credit wagering" system, the bookmaker's acceptance of a bet is dependent on the amount of credit available to the bettor, in the same way that WSE's acceptance of a bet was dependent on the amount of cash in the bettor's account. Petitioner's reading of the law, therefore, would equally exclude both forms of betting, thereby placing outside the definition of "betting or wagering" every traditional form of placing and receiving bets.

The cases relied on by petitioner are not to the contrary. In *United States* v. *Truesdale*, 152 F.3d 443, 448 (5th Cir. 1998), the court found that the jury could not properly infer that bets were sent or received in Texas solely from evidence that two toll-free numbers used by the organization terminated in that State, because there were other toll-free "betting lines" that terminated elsewhere. In the older cases of *Lescallett* v. *Commonwealth*, 17 S.E. 546, 548 (Va. 1893), and *McQuesten* v. *Steinmetz*, 58 A. 876, 877 (N.H. 1904), the courts held that orders for an intermediary to place bets with a bookie were not themselves completed betting contracts because the intermediaries did not accept the bets or otherwise bind themselves to pay the bettors. And in *Saratoga Harness Racing, Inc.* v. *City of Saratoga Springs*, 55 A.D.2d 295, 296 (N.Y. 1976), the court concluded that the fact that an off-track bet is taken by telephone from a person in the City of

Saratoga does not establish that betting is conducted in Saratoga for purposes of subjecting the off-track betting corporation to taxation in that county. None of these cases implies that a bet may not be transmitted from one location to another. To the extent that they recognize the general principle that a contract is reached by an offer and an acceptance, they do not help petitioner, since the proof against him showed a two-way wire transmission of both an offer to bet and WSE's acceptance of the offer.[7]

c. Even if the placing of bets by means of WSE's toll-free telephone lines and Internet site did not consti-

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[7] Petitioner argues (Pet. 27-29) that if the transmissions at issue consisted of "bets or wagers" in violation of Section 1084(a), then so do out-of-state telephone or electronic contacts with state-authorized OTB facilities for the purpose of placing a bet. He points out (Pet. 28 & n.15) that during 2000, Congress amended the IHA to regulate interstate "wagers" with state OTB facilities when lawful in each State involved (see 15 U.S.C. 3002(3)), suggesting that Congress viewed such wagers as legal. Petitioner concedes, however, that the interstate transmission of "wagers" is not exempted by the "safe harbor" provision; his argument is that WSE did not receive "bets or wagers," only instructions on their placement. The presidential signing statement accompanying the amendment made clear that, in the view of the Department of Justice, the amendment was not intended to alter or repeal Section 1084 or to legalize "interstate account wagering" even where lawful in the States involved. *Statement by President William J. Clinton Upon Signing H.R. 4942*, 36 Weekly Comp. Pres. Doc. 3153 (Dec. 21, 2000). In addition, to the extent that the amendment suggests that certain interstate wagers with state OTB facilities might be lawful, it applies strictly to wagers on horse races; WSE took bets on other types of sporting events, not on horse races. Finally, any conflict between the 2000 amendment and Section 1084, which was enacted by a different Congress almost 40 years earlier, could not help petitioner, since the conduct for which he was convicted occurred before the enactment of the amendment.

tute the transmission of "bets or wagers," petitioner cannot escape the jury's independent determination with respect to five of the counts on which he was convicted that the bet-placement transmissions involved a communication "which entitles the recipient to receive money or credit as a result of bets or wagers" in violation of the third clause of Section 1084(a). See p. 3, *supra*.[8] Like violations of the first clause of the statute, violations of the third clause are not subject to the "safe harbor" provision of Section 1084(b). Whether or not the transmissions consisted only of "instructions to bet," once a bet was accepted and confirmed in the very same two-way communication, a contract was formed entitling WSE, "a recipient" of the communication, to "money or credit as a result of bets or wagers"—that is, to its percentage of the bet no matter the outcome of the sporting event.

3. Petitioner contends (Pet. 22-26) that a defendant's good-faith belief that he was not transmitting "bets or wagers" is a defense to a Section 1084(a) charge, and that the district court should have instructed the jury accordingly. He relies on the language in the statute requiring the offense to be committed "knowingly."

Petitioner does not purport to argue that ignorance of the law is a defense to a substantive Section 1084(a) charge. See Pet. 23-26. Rather, he argues that a person cannot "knowingly" violate Section 1084(a) without believing that the conduct in which he engaged was

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[8] Petitioner's convictions on the remaining two counts, which did not charge a violation of the third clause of Section 1084(a), are of no practical consequence, since the sentences on each count on which petitioner was convicted are concurrent and petitioner's sentencing range under the Sentencing Guidelines was effectively determined by the other five counts.

prohibited by the statute. But that is just another way of framing an "ignorance of the law" defense.

As this Court has held, "ignorance of the law or a mistake of law is no defense to criminal prosecution." *Cheek* v. *United States*, 498 U.S. 192, 199 (1991). Of course, Congress may supplant that general rule by making knowledge that the charged conduct is an unlawful element of the offense, and Congress's use of the term "willfully" has that effect in certain contexts. See *Bryan* v. *United States*, 524 U.S. 184, 193 (1998). The word "knowingly," however, "merely requires * * * knowledge of the facts that constitute the offense," not knowledge that the prohibited conduct is unlawful. *Ibid.* Consistent with those principles, the Tenth Circuit has held that knowledge of the statutory prohibition is not an element of a Section 1084(a) offense. *United States* v. *Blair*, 54 F.3d at 642.

Petitioner's reliance (Pet. 23) on *Cohen* v. *United States*, 378 F.2d 751, 756 (9th Cir.), cert. denied, 389 U.S. 897 (1967), is unavailing. In that case, the court of appeals held that, in a prosecution under Section 1084(a), the defendant should be presumed to know the law but that he may rebut the presumption with proof of his ignorance. *Id.* at 756-757. In reaching that conclusion, the court did not engage in any analysis of the relevant statutory language. Rather, it reasoned that betting is legal in Nevada, and that the rebuttable presumption of knowledge afforded those "innocent of intentional wrongdoing" a defense without impeding the statute's purpose of discouraging professional interstate gambling. *Id.* at 756. *Cohen*, however, predated this Court's recent interpretations of the word "knowingly" in *Bryan* and other cases. Significantly, in a much more recent case, the Ninth Circuit rejected the rationale of its prior decision in *Cohen* (without citing

that case) in holding that knowledge of the law is not an element of the offense of transporting wagering paraphernalia in interstate commerce, in violation of 18 U.S.C. 1953. *United States* v. *Mendelsohn*, 896 F.2d 1183, 1188 (9th Cir. 1990). In light of subsequent decisions, there is serious doubt about the continuing force of *Cohen* in the Ninth Circuit.

Petitioner cites (Pet. 24-25) *Liparota* v. *United States*, 471 U.S. 419 (1985), and *Morissette* v. *United States*, 342 U.S. 246 (1952), for the proposition that the word "knowingly" may require knowledge of the law. In *Liparota*, the Court held that in a prosecution under 7 U.S.C. 2024(b)(1), which makes it a crime "knowingly" to possess or acquire food stamps "in any manner not authorized by [the statute] or the regulations," the government must show that the defendant knew that his acquisition or possession of food stamps was in a manner unauthorized by law. 471 U.S. at 423-434. Subsequently, in *Bryan* v. *United States*, 524 U.S. at 193 n.15, the Court explained that it had reached that result based on the fact that the term "knowingly" in Section 2024(b)(1) "literally referred to knowledge of the law," 524 U.S. at 193 n.15, by virtue of the "in any manner" clause quoted above. Section 1084(a) does not contain equivalent language.

Nor is petitioner helped by *Morissette*. In that case the defendant was convicted of stealing spent bomb casings from federal property in violation of a statute making it unlawful to "knowingly convert[]" property of the United States. The trial court instructed the jury that criminal intent could be predicated on the isolated act of taking the property without more. This Court held that the instruction was error because the defendant might have thought that the property was abandoned. 342 U.S. at 276. The Court explained that a

"knowing conversion" requires "knowledge of the facts, though not necessarily the law, that made the taking a conversion." *Id.* at 270-271. Accordingly, *Morissette* does not support petitioner's construction of the word "knowingly" to require knowledge of the law.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

# Supreme Court of the United States

JAY COHEN,

*Petitioner,*

v.

UNITED STATES,

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## REPLY BRIEF

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14 pg

## TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... ii

I. Mr. Cohen's Contention That He Falls Within § 1084's Safe Harbor Presents Issues That Have Divided the Circuits and Are Critically Important. ... 1

II. There Remains a Deep and Abiding Split on the Application of the *Powell* Doctrine to § 371. ..... 7

CONCLUSION ..... 10

## TABLE OF AUTHORITIES

Page

**CASES**

*Bryan v. United States*, 524 U.S. 184 (1998) ..... 6

*Carter v. United States*, 530 U.S. 255 (2000) ..... 6

*Hamburg-American Steam Packet Co. v. United States*, 250 F. 747 (2d Cir. 1918) ..... 7, 8

*Landen v. United States*, 299 F. 75 (6th Cir. 1924) ..... 8

*Liparota v. United States*, 471 U.S. 419 (1985) ..... 5, 6

*Los Angeles Police Department v. United Reporting Publishing Corp.*, 528 U.S. 32 (1999) ..... 7

*Morissette v. United States*, 342 U.S. 246 (1952) .... 5, 6

*People v. Powell*, 63 N.Y. 88 (1875) ..... *passim*

*Sterling Suffolk Racecourse Limited Partnership v. Burrillville Racing Association*, 989 F.2d 1266 (1st Cir. 1993) ..... 1, 2, 3, 4

*United States v. Blair*, 54 F.3d 639 (10th Cir. 1995) .... 8

*United States v. Crimmins*, 123 F.2d 271 (2d Cir. 1941) ..... 8

*United States v. Feola*, 420 U.S. 671 (1975) ..... *passim*

*United States v. Leon*, 534 F.2d 667 (6th Cir. 1976), *overruled on other grounds by United States v. Stone*, 748 F.2d 361 (6th Cir. 1984) ..... 8, 9

*United States v. Mack*, 112 F.2d 290 (2d Cir. 1940) ..... 8

*United States v. Mendelsohn*, 896 F.2d 1183 (9th Cir. 1990) ..... 6

**TABLE OF AUTHORITIES - continued**

Page

*United States v. Murray*, 928 F.2d 1242 (1st Cir. 1991) ..... 8, 9

*United States v. Previte*, 648 F.2d 73 (1st Cir. 1981) .... 9

*United States v. Thomas*, 887 F.2d 1341 (9th Cir. 1989) ..... 8

*United States v. X-Citement Video,* 513 U.S. 64 (1994) .. 6

*United States v. Reminga*, 493 F. Supp. 1351 (W.D. Mich. 1980) ..... 9

*United States v. Stone*, 748 F.2d 361 (6th Cir. 1984) .... 8

**STATUTES**

15 U.S.C. § 3004 ..... 2

15 U.S.C. § 3006 ..... 2

18 U.S.C. § 371 ..... 1

18 U.S.C. § 1084 ..... *passim*

18 U.S.C. § 1953 ..... 6

18 U.S.C. § 1955 ..... 2

N.Y. Gen. Oblig. Law § 5-401 (2001) ..... 3

## REPLY BRIEF

The government's response seeks only to obscure, because it cannot refute, the two critical points of Mr. Cohen's petition. First, the petition squarely presents abiding Circuit conflicts with respect to two important federal statutes – the general federal conspiracy statute (18 U.S.C. § 371) and the Wire Act (18 U.S.C. § 1084) – including one conflict that has been expressly acknowledged and reserved by this Court on at least three occasions. Second, the petition is of critical importance because, as the government concedes, if its interpretation of § 1084 is correct, then interstate off-track betting – a multi-billion dollar state endorsed and congressionally approved industry – is flatly prohibited.

### I. Mr. Cohen's Contention That He Falls Within § 1084's Safe Harbor Presents Issues That Have Divided the Circuits and Are Critically Important.

1. The government strives to mask the split between the decision below and the First Circuit's decision in *Sterling Suffolk Racecourse Limited Partnership v. Burrillville Racing Ass'n*, 989 F.2d 1266 (1st Cir. 1993), which held that "Congress, in adopting § 1084, did not intend to criminalize acts that neither the affected states nor Congress deemed criminal in nature." *Id.* at 1273. Although conceding that *Sterling* addressed whether certain conduct was "legal" under § 1084(b)'s safe harbor provision, the government contends that *Sterling* did not address a situation in which the relevant conduct had been prohibited (but not criminalized) by a *State*. *See* U.S. Br. at 11 (arguing that the First Circuit did not hold that "placing a bet is 'legal' *in a State that specifically prohibits it* by statute but does not attach criminal penalties to the prohibition" (emphasis added)). But *Sterling did* address the meaning of the word "legal" as applied to conduct that had been prohibited (again, without criminal penalties attaching) by *Congress*. The meaning of the single word "legal" in § 1084(b) cannot vary according to whether a state or federal government proscribes the relevant conduct, and the government offers no

argument to the contrary.[1]

Further, the government blithely dismisses the cases holding that the term "illegal gambling business" in 18 U.S.C. § 1955 covers only gambling businesses that are "in violation of state penal law," *see* Pet. at 21-22, arguing in a footnote that those cases neither "involve[] Section 1084 nor the meaning of the term 'legal.'" U.S. Br. at 11 n.5. But the government does not contest that § 1955 and § 1084 (as well as § 1952, which contains similar language) are part of a comprehensive effort by Congress to help States address the perceived problems caused by interstate gambling and should be interpreted *in pari materia*. And while § 1955 uses the term "illegal" and § 1084 uses the term "legal," the government offers no explanation for why the former should be limited to violations of state criminal law while the latter should extend more broadly.

The government next suggests that Congress endorsed the government's cramped interpretation of the word "legal" when it noted in the legislative history that New York's gambling laws would be covered by the statute. U.S. Br. at 10. What the government fails to explain is that, when § 1084 was enacted in 1961, the gambling prohibitions in New York were part of the state *penal code*. In the Penal Law of 1965, however, New York removed those prohibitions from the penal code. *See,*

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[1] To the extent that the government intends to distinguish *Sterling* by suggesting that 15 U.S.C. § 3004, the federal statute that put legality at issue in *Sterling*, created only a "private cause of action" and "did not intend that there be government enforcement," U.S. Br. at 11, that argument is meritless. Section 3004 expressly prohibited the relevant conduct, *see Sterling*, 989 F.2d at 1267 (noting that § 3004 "prohibits such wagering at OTB offices unless three parties consent"); created civil, but not criminal, liability for the conduct in question, *see id.* at 1273 (noting that the statute does not create "the specter of criminal penalties" and that violators will "be civilly liable"); and gave States authority to enforce the federal prohibition, *see id.* (violators are liable to, among others, the "host State"); *see also* 15 U.S.C. § 3006 (creating a civil cause of action on behalf of the "host State").

*e.g.*, N.Y. Gen. Oblig. Law § 5-401 (2001) (Historical and Statutory Notes). Thus, although Congress may have expected that § 1084 would cover gambling to and from New York in light of New York's policies toward gambling in 1961, that says nothing about whether Congress would have expected § 1084 to cover such gambling once New York had amended its laws to effect its change in policy.

Indeed, the government's argument highlights a principal flaw in its position. As reflected in the legislative history and, more important, in § 1084's safe harbor provision, Congress sought to aid States in their efforts to combat organized criminal gambling activity, while respecting and accommodating state (and even international) policies toward gambling. *See, e.g.*, *Sterling*, 989 F.2d at 1273 (purpose of § 1084 was to "reserv[e] to individual states some measure of control over what forms of gambling could occur within their borders"). The government's position eliminates this critical congressional accommodation, so that even when a State chooses to decriminalize gambling, it is still a federal crime when a citizen of that State arranges for a bet to be placed in another jurisdiction where betting is legal. That interpretation is completely at odds with the statute – and with the safe harbor provision – that Congress enacted.[2]

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[2]In a final attempt to distract attention from the split, the government concedes that "it is true that the placing of a bet is not a crime in New York State," but suggests in a footnote that the safe harbor in § 1084(b) should not apply because bookmaking remains a crime in New York in some circumstances. *See* U.S. Br. at 12 n.6 (conceding that the criminal provisions of New York law apply only to an individual who is *not* the "contestant or bettor"). But the criminal status of bookmaking is irrelevant to § 1084's safe harbor provision. By its plain language, that provision is triggered when "betting" – not bookmaking – is "legal" in the relevant jurisdiction, and that is why neither the district court nor the Second Circuit deemed the government's discussion of bookmaking relevant.

2. The government next suggests that Mr. Cohen's argument must fail because the transmissions in question were bets rather than information related to bets, and thus fall outside the safe harbor. But the government does not (and cannot) dispute that Mr. Cohen's business operated in precisely the same manner as state sanctioned and congressionally approved off-track betting.[3] Thus, if the interstate transmissions at issue were bets rather than information related to bets, then most interstate OTB transmissions are also bets rather than information related to bets, the safe harbor does not apply to those transmissions, and every OTB facility that accepts interstate account wagering violates § 1084.

The government's only response is that nothing in the IHA "was intended to legalize 'interstate account wagering' even where lawful in the States involved," and that the IHA cannot help petitioner because it post-dated both the enactment of §1084 and the conduct at issue in this case. *See* U.S. Br. at 15 n.7. But the government's response mischaracterizes Mr. Cohen's position. It is not that the IHA amended § 1084 or otherwise changed the relevant criminal law; instead, the IHA, which reflects Congress' regulation of an aspect of OTB that has been occurring under state supervision on a daily basis for decades, merely confirms that Congress did not remotely consider such conduct to constitute a federal felony.

Indeed, the government's position is all the more remarkable because, as the First Circuit noted in *Sterling*, it is "beyond peradventure that Congress enacted section 1084(b) for the express purpose of allowing off-track betting in venues where states chose to legalize such activity." *Sterling*, 989 F.2d at 1272-73. This Court should not condone the government's

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[3] Nor does the government's superficial discussion of the case law distinguishing between an offer to bet and a bet itself undermine the applicability of those cases here, where an account wagering system was in place. *See* Pet. at 26-27.

efforts to secure a conviction on the basis of an interpretation that so plainly flies in the face of common sense and congressional intent.

Moreover, even if the transmissions in question were bets rather than information related to bets, the Second Circuit's conclusion that Mr. Cohen did not have to "know" they were bets conflicts with this Court's cases and is worthy of review.[4] The government attempts to recast Mr. Cohen's "knowingly" argument as a straightforward "ignorance of the law" defense. But whether a party has knowingly transmitted "bets or wagers" within the meaning of the statute is a factual question – albeit one that involves a legal element – because the meaning of "bets or wagers" is defined by reference to civil law concepts such as offer and consideration. Mr. Cohen thus does not claim a mistake of law; he claims a mistake of legal fact.

Contrary to the government's contention, *Liparota* and *Morissette* demonstrate that the word "knowingly" in § 1084 may require knowledge of a legal element. The government seeks to distinguish *Liparota* on the ground that the statute at issue there referred to a body of civil law expressly. But *Liparota* itself did not rely on that distinction and instead distinguished "mistake of legal fact" from "mistake of law" more broadly:

> In the case of a receipt-of-stolen-goods statute, the legal element is that the goods were stolen; in this case, the legal element is that the 'use, transfer, acquisition' etc. [of food stamps] were in a manner not authorized by statute or regulations. It is not a defense to a charge of receipt of stolen goods that one did not know that such receipt was illegal . . . . It *is*, however, a defense to a charge of

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[4]Although this question of scienter under § 1084 is independently worthy of review, if Mr. Cohen prevails on his argument that the transmissions were not bets and were legal in New York, then the Court would not have to reach the scienter question.

> knowing receipt of stolen goods that one did not know that the goods were stolen . . . .

*Liparota v. United States*, 471 U.S. 419, 425 n.9 (1985). This interpretation is confirmed by *Liparota*'s reliance on *Morissette*, which involved a statute that did not expressly cross-reference another statute, but instead involved knowledge of general property law. *See Morissette v. United States*, 342 U.S. 246, 248 n.2, 270-71 (1952), *cited in Liparota*, 471 U.S. at 425 n.9. *See also* Pet. at 24-26.

In other words, although the statute at issue in *Liparota* contained a particularly explicit reference to a body of civil law, that is by no means the only way that a criminal statute may contain an embedded civil-law element: a statute requiring knowledge that goods are "stolen" requires knowledge of property law, and a statute requiring knowledge that "bets or wagers" are transmitted requires knowledge of contract and other civil law. When that separate body of law is what distinguishes criminal from innocent conduct, a strong presumption in favor of scienter applies. *See Carter v. United States*, 530 U.S. 255, 269 (2000) ("The presumption in favor of scienter requires a court to read into a statute only that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" (quoting *United States v. X-Citement Video,* 513 U.S. 64, 72 (1994)).[5]

*United States v. Mendelsohn*, 896 F.2d 1183 (9th Cir. 1990), which addressed 18 U.S.C. § 1953, is not to the contrary, *cf.* U.S. Br at 18; indeed, that case did not address mistake of legal fact at all. To the extent that it has any relevance here, *Mendelsohn* merely confirms that the lower

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[5]Nothing in *Bryan v. United States*, 524 U.S. 184 (1998), is to the contrary, as that case held only that the term "knowingly" generally "requires proof of knowledge of the facts that constitute the offense," and explained that the result in *Liparota* was dictated by the "text of the statute." *Id.* at 193 & n.15.

courts are in disarray as to the proper scienter requirement in § 1084 and related statutes.

3. The government lastly contends that petitioner violated the third clause of § 1084(a), which prohibits a communication "which entitles the recipient to receive money or credit as a result of bets or wagers." U.S. Br. at 16. But the Second Circuit did not pass on this argument, and it thus offers no basis for denying the petition. *See, e.g., Los Angeles Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32, 41 (1999).[6]

## II. There Remains a Deep and Abiding Split on the Application of the *Powell* Doctrine to § 371.

The government argues that this Court's decision in *Feola* resolved the applicability of *Powell* to § 371 and has been so interpreted by all federal courts since 1975, even though *Feola* expressly reserved the *Powell* question. The government vastly overreads *Feola* and minimizes the continuing significance of the split among the Circuits.[7]

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[6]In any event, the government's argument is meritless. The government argues here as it did on appeal (but not in the district court) that the relevant transmissions entitled WSE to "money or credit" because WSE allegedly received a "percentage of the bet." U.S. Br. at 16. This is a flat mischaracterization – WSE did not take a percentage. Instead, like many betting institutions, WSE simply offered certain odds on an event, and bettors decided whether to take those odds. If an individual bettor won a bet, WSE took nothing, and if a bettor lost a bet WSE took no more than the amount of the bet (Tr. 71-72). Moreover, if the government's interpretation were correct, then every transmission to a wagering operation (including transmissions to OTB facilities) would violate the third clause of § 1084(a), the first clause would be entirely superfluous, and § 1084(b) would never be applicable.

[7] Similarly unavailing is the government's attempt to assert that a split on the *Powell* doctrine existed in 1948, when the general conspiracy statute was reenacted and when the *Powell* doctrine was consistently applied. In addition to citing this Court's decision in *Keegan*, *see* Pet. at 16-17 & n.10, the government relies on two Second Circuit cases: *Hamburg-American Steam Packet Co. v. United States*, 250 F. 747 (2d Cir. 1918), in which the

*Feola* itself involved an offense – assault – that was *malum in se*, and thus *Feola*'s rejection of any scienter requirement provided no occasion to consider the application of scienter to an offense that was *malum prohibitum*. The subsequent Circuit cases relied upon by the government generally discuss or apply this *Feola* holding – sometimes with reference to a federal gambling statute – but simply do not address or decide or even mention the *Powell* doctrine, which was not presented under the facts of those particular cases. *See* Pet. at 13 n.7 (discussing and distinguishing *United States v. Blair*, 54 F.3d 639 (10th Cir. 1995), *United States v. Murray*, 928 F.2d 1242 (1st Cir. 1991), and *United States v. Thomas*, 887 F.2d 1341 (9th Cir. 1989)).

That none of these decisions – let alone *Feola* itself – in any way resolves the Circuit split that was expressly acknowledged by the Second Circuit below is well illustrated by *United States v. Leon*, 534 F.2d 667 (6th Cir. 1976), *overruled on other grounds by United States v. Stone*, 748 F.2d 361 (6th Cir. 1984), a decision that the government suggests overruled *sub silentio* the Sixth Circuit's express adoption of *Powell* in *Landen v. United States*, 299 F. 75 (6th Cir. 1924). U.S. Br. at 7-8 & n.3. But although *Leon* involves a federal gambling statute related to § 1084, and although its holding rests on *Feola*, its relevance ends there. *Leon* does no more than conclude that knowledge of a "jurisdictional requirement which is unrelated to the criminal character of the conduct" –

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court spoke only in dicta, *see id.* at 759 (stating that "the act complained of was not innocent, but dishonest and fraudulent"); *see also Landen v. United States*, 299 F. 75, 79 (6th Cir. 1924); and *United States v. Mack*, 112 F.2d 290 (2d Cir. 1940), in which Judge Hand found in the facts before him "corrupt motive in abundance," *id.* at 292. The government utterly ignores, however, Judge Hand's 1941 decision in *United States v. Crimmins*, 123 F.2d 271 (2d Cir. 1941), which essentially endorsed the *Powell* doctrine. *See id.* at 273; *see also United States v. Feola*, 420 U.S. 671, 691-92 (1975) (discussing *Crimmins*); Pet. at 15 n.9.

that a gambling business involved more than five persons – need not be shown to prove a conspiracy to violate § 1955, because "[t]he special purposes underlying the imposition of criminal liability for conspiracy" are not advanced by requiring this specific knowledge. *Leon*, 534 F.2d at 674-75. In other words, *Leon* simply does not speak to questions like the innocence of the underlying act, the necessity for a corrupt motive, or even the need for some awareness of the unlawful nature of the conspiracy – it rests only on jurisdictional grounds. *See id.*; *see also, e.g.*, *United States v. Previte*, 648 F.2d 73, 81-82 (1st Cir. 1981) (recognizing the *Powell* doctrine without mentioning *Murray*, which did no more than restate the holding of *Feola* in the most general terms before overturning a conspiracy conviction on the grounds of insufficient evidence). Accordingly, it is not surprising that a post-*Feola* district court decision from the Sixth Circuit, *United States v. Reminga*, 493 F. Supp. 1351 (W.D. Mich. 1980), which the government wholly ignores, relied on *Landen* to acquit a defendant on *Powell* doctrine grounds and did not allude to *Leon* in doing so. *See id.* at 1360-61.

In short, the split among the Circuits on *Powell* remains vital. Because this case squarely presents the *Powell* issue, and because the *Powell* question continues to arise, is virtually certain to recur in the § 1084 context, and has been answered differently by a number of different Circuits, this Court should grant the petition. Unless this Court does so, the government's choice of forum – rather than the merits of the case – will determine whether defendants such as Mr. Cohen will be subject to conviction under the general federal conspiracy statute.

## CONCLUSION

The petition for a writ of certiorari should be granted.

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